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No. 651

In The

Supreme Court of the United States

term, 19

PAUL E. RHODES, PETITIONER,

V.

MAURICE SIGLER, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
To The Supreme Court of Nebraska.

PAUL E. RHODES, Pro Se,
Convict No. 22107,
Nebraska State Penitentiary,
Lincoln, Nebraska.

PAUL RHODES, Pro Se,
Counsel of Record.

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PETITION FOR WRIT OF CERTIORARI
To The Supreme Court of Nebraska.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Paul E. Rhodes for a writ of certiorari to be directed to the Supreme Court of the State of Nebraska, to review a judgment of that court entered on the 23rd day of June, 1961, rehearing denied on the 13th day of October 1961.

OPINION BELOW

The opinion appealed from is entitled Paul E. Rhodes, Appellant v. Maurice Sigler, Appellee, and is reported

in 172 Neb. 439, and is printed in Appendix A hereto, infra, page 23.

JURISDICTION

The opinion and judgment sought to be reviewed was dated June 23, 1961, and was entered of record on that date. Rehearing was denied on October 13, 1961 (Appendix A, page 38). Contained in transcript at page 132.

The jurisdiction of this Court is invoked under the Act of Congress of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. Code, Sec. 1257 (2) and (3), providing that this Court may, by writ of certiorari, review any final judgment for decree rendered by the highest Court of a State in which a decision could be had, where any title, right, privilege or immunity especially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under the United States.

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether a trial in absence of defendant in a contempt proceeding and no order being issued for the arrest of defendant, he not being in custody and not within the jurisdiction of the court, the court enters an order finding defendant guilty in his absence and sentences him to the penitentiary at hard labor for contempt of court, and the court does not order him into custody, is the Clerk of the Court authorized to issue a commitment to the penitentiary without order of the court thereof, and the Supreme Court of the state thereafter suspends the execution of said sentence, and thereafter without a warrant or order of the court the pe-

titioner is taken into custody by force, and thereafter the commitment is executed by the sheriff and the Warden of the penitentiary without any order for execution of the sentence; is petitioner as relator in a District Court Habeas Corpus proceeding entitled to a Writ of Habeas Corpus and discharge from custody.

2. Whether a trial in absentia, in absence of defendant, for contempt of court is a nullity, absolutely void, and petitioner imprisoned thereunder is entitled to discharge upon Habeas Corpus.

3. Whether there is power or authority to arrest on a commitment; whether it is a warrant for purposes of arrest.

4. Whether after suspension of sentence by the Supreme Court of Nebraska on error proceedings the sheriff has authority to execute a commitment issued prior to said suspension without further order of the court directing its execution.

5. Whether where sentence is executed after suspension by the Supreme Court of Nebraska and confinement had in the penitentiary contrary to the suspension, Habeas Corpus is the proper remedy for discharge and release.

6. Whether a sentence for contempt of court at hard labor in the penitentiary is absolutely void in Nebraska and in violation of Article I, Sec. 2, of Nebraska Constitution and the Thirteenth Amendment of the Constitution of the United States and the Fourteenth Amendment, Section 1, of the Constitution of the United States, the due process clause, and the petitioner imprisoned thereunder at hard labor is entitled to a Writ of Habeas Corpus and Discharge from Custody.

7. Whether the clerk of the court is authorized to issue commitment to the penitentiary where defendant is not in custody and there is no order of court directing that he be taken into custody.

8. Whether when detention is had under a void sentence Habeas Corpus is the proper remedy to secure discharge and release from custody.

9. Whether when imprisonment is being suffered under void judgment for contempt Habeas Corpus proceeding is the proper proceeding for inquiry into the question of jurisdiction.

10. Whether when proceedings are wholly void for want of jurisdiction over the subject matter, or wholly illegal, habeas corpus proceedings are the proper procedure for release from said unlawful imprisonment and involuntary servitude.

11. Whether the court in prosecution for criminal contempt has jurisdiction to try defendant in his absence, make a finding of guilty and pass sentence.

12. Whether the rules which govern criminal prosecutions apply to prosecution for criminal contempt.

13. Whether the court has jurisdiction to sentence to the penitentiary at hard labor in Nebraska for contempt of court, no trial by jury being allowed in contempt proceedings.

14. Whether the court has jurisdiction of the subject matter in a contempt proceeding at time of trial when alleged defendant is not present in court.

15. Whether the court in Nebraska is without jurisdiction to order confinement at hard labor in the penitentiary in Nebraska for contempt of court when, pur-

suant to Article I, section 2 of Nebraska Constitution and the Sixth Amendment to the Constitution of United States of America, no imprisonment may be made to penitentiary without trial by jury, or conviction of a crime. Trial by jury is not allowed in criminal contempt proceedings in Nebraska, and therefore any confinement in the penitentiary for contempt of court is a denial of due process of law pursuant to Fourteenth Amendment of the Constitution of United States of America, Section 1.

16. Whether the writ of habeas corpus is proper procedure to review a judgment where petitioner is imprisoned without due process of law.

17. Whether the Supreme Court of Nebraska was prohibited by the Constitution of the United States from legislating and repealing 29-2801, R. R. S. Nebraska 1943, re-issue of 1956, and deprive the county courts and district courts of jurisdiction in habeas corpus matters as provided by said statutes or whether the function of government is reserved to the Legislature.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. Constitution, Amendment XIV, Section 1:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U. S. Constitution, Amendment XIII, Section 1:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

U. S. Constitution, Amendment IV:

"The right of the people to be secure in their persons, * * * against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing * * * the persons or things to be seized."

U. S. Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * * to be confronted with the witnesses against him * * *."

U. S. Constitution, Amendment VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U. S. Constitution, Article I, Section 9:

"* * * The privilege of the Writ of Habeas Corpus shall not be suspended * * *."

Nebraska Constitution, Article One, Section 11; R. R. S. Neb., Vol. 2, p. 56:

"* * * In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel * * * to meet the witnesses against him face to face * * * and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Nebraska Constitution, Article One, Section 2; R. R. S. Neb., Vol. 2, p. 42:

"Slavery Prohibited. There shall be neither slavery nor involuntary servitude in this state, otherwise than

for punishment of crime, whereof the party shall have been duly convicted."

Nebraska Constitution, Article 3; R. R. S. Neb., Vol. 2, p. 56:

"Due Process of Law. No person shall be deprived of life, liberty, or property without due process of law."

Nebraska Constitution, Article I, Section 7; R. R. S. Neb., Vol. 2, p. 54:

"Search and Seizure. The right of the people to be secure in their persons * * * against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, * * * and particularly describing the * * * person or thing to be seized."

Nebraska Constitution, Article I, Section 8; R. R. S. Neb., Vol. 2, p. 54:

"Habeas Corpus. The privilege of the writ of habeas corpus shall not be suspended * * *."

Nebraska Constitution, Article I, Section 9; R. R. S. Neb., Vol. 2, p. 54:

"Bail; fines; imprisonment. * * * shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Nebraska Constitution, Article II, Section 1; R. R. S. Neb., Vol. 2, p. 76:

"'Legislative, executive, judicial. The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others * * *."

R. R. S. Neb. 1943, 29-2801:

"If any person * * *, shall be unlawfully deprived of his or her liberty and shall make application, either by himself or by any person on his or her behalf, to any one of the judges of the District Court, * * *, and does at the same time produce to such judge a copy of the commitment or cause of detention of such person, or if the person so imprisoned or detained is imprisoned or detained without any legal authority, upon making the same appear to such judge, by oath or affirmation, it shall be his duty forthwith to allow a writ of habeas corpus, which writ shall be issued forthwith by the clerk of the district court, * * * under the seal of the court, whereof the person allowing such writ is judge, directed to the proper officer, person or persons who detains such prisoner."

R. R. S. Neb. 1943, 29-2001:

"Trial; felony; misdemeanor; presence of accused required; exceptions. No person indicted for a felony shall be tried unless personally present during the trial. Persons indicted for a misdemeanor may, at their own request, by leave of the court be put on trial in their absence. The request shall be in writing and entered on the journal of the court."

R. R. S. Neb. 1943, 29-2201:

"Verdict of 'guilty'; accused to be notified before sentence. Before the sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, and asked whether he has anything to say why judgment should not be passed against him."

R. R. S. Neb. 1943, 29-2202:

"Verdict of 'guilty'; judgment; when pronounced; suspension of sentence; when. If the defendant has nothing to say, or if he shows no good and sufficient cause why judgment should not be pronounced, the

court shall proceed to pronounce judgment as provided by law. The court, in its discretion, may for any cause deemed by it good and sufficient, suspend execution of sentence for a period not to exceed ninety days from the date judgment is pronounced. If the defendant is not at liberty under bail, he may be admitted to bail during the period of suspension of sentence as provided in Section 29-901.

R. R. S. Neb. 1943, 29-2303:

"Writ of error; felony cases; procedure; escape of convict; warrant issued. Whenever a person shall be convicted of a felony, and the judgment shall be suspended as aforesaid, it shall be the duty of the court to order the person so convicted into the custody of the sheriff, to be imprisoned until the case in error be disposed of, or such person admitted to bail. If a person so convicted shall escape, the jailer or other officer from whose custody the escape was made may return to the clerk of the proper court the writ by virtue of which the convict was held in custody, with information of the escape endorsed thereon, whereupon the clerk shall issue a warrant stating such conviction, and commanding the sheriff of the county to pursue such person into any county in the state; and the sheriff shall take such person and commit him to the jail of the county."

R. R. S. Neb. 1943, 29-2309:

"Writ of error; felony cases; how returnable. In all cases of conviction for a felony, the court, judge or judges allowing the writ of error shall order the same to be made returnable before the Supreme Court, and shall order a suspension of the execution of sentence."

R. R. S. Neb. 1943, 29-2401:

"Execution of sentences; conviction of felony; delivery of prisoner to penitentiary. Every person sen-

tenced to the penitentiary shall, within thirty days, and as early as practicable after his sentence, unless the execution thereof be suspended, be conveyed to the penitentiary of this state by the sheriff of the county in which the conviction took place, and shall there be delivered into the custody of the warden of the penitentiary, together with a copy of the sentence of the court ordering such imprisonment, there to be safely kept until the term of his confinement shall have expired, or he shall be pardoned. If the execution of the sentence be suspended and the judgment is afterward affirmed, the defendant shall be conveyed to the penitentiary within thirty days after the court shall direct the sentence to be executed."

STATEMENT

This action was started as a habeas corpus action in the District Court of Lancaster County, Nebraska. The petition of the petitioner for writ of habeas corpus alleged that petitioner was unlawfully imprisoned in the Nebraska State Penitentiary at *HARD LABOR* under a judgment and sentence of the District Court of Morrill County, Nebraska, entered in a proceeding for contempt of court and contained a copy of the judgment of the court containing this language to-wit: "'The defendant was not present and was not represented by counsel. . . . This matter came on further to be heard upon the merits.' * * * The allegations were that the District Court had no jurisdiction, power or authority, (a) to try the case in absence of the defendant, (b) to enter judgment and pass sentence in absence of defendant, (c) to pronounce sentence of imprisonment in the Nebraska State Penitentiary for nine months, at *Hard Labor*, and fine of $2,500.00 and costs for the offense of contempt of court, or (d) to sentence to Hard Labor for such offense." The petition is contained at

page 9 of the transcript. The petition further alleges at page 11 that said sentence is repugnant to the XIII Amendment to the Constitution of the United States of America, and is repugnant to the Due Process and Equal Protection Clause of the XIV Amendment to the United States Constitution. Petitioner further alleged that the District Court of Morrill County had no jurisdiction because it had been divested of jurisdiction by previous habeas corpus action which released defendant, and discharged him from such custody and charge of contempt, and that the district judge trying the case was disqualified to sit on the matter.

Attached to the petition, and made a part thereof, are copies of the information for contempt, the plea in abatement made thereto, other filings, and the proceedings of the District Court of Morrill County, Nebraska, together with a copy of the writ of error of the Supreme Court of Nebraska, in Case No. 34978, which writ of error indicated that the Supreme Court had suspended the execution of the judgment, and also indicated that the plaintiff in error should be admitted to bail, pending the outcome of that proceeding. The petition and attached exhibits, made a part thereof, clearly indicated that petitioner was not in custody or jurisdiction of the court on November 21, 1960, and no order was ever entered by the court authorizing the issuance of a warrant to deprive defendant of his liberty, and that no warrant was ever issued authorizing the sheriff to deprive the defendant of his liberty as required by the IV Amendment to the Constitution of the United States of America, and further attached to the petition and shown in the transcript of the record at page 83 is the Commitment to the Penitentiary issued by the Clerk of the District Court without order

of the court authorizing the issuance of the same; at page 84 of the record is the return of the sheriff thereon showing the execution of said commitment on January 23, 1961, and the sheriff's signature thereon and the filing of the same by the Clerk of the District Court after return thereon on January 24th, 1961, and at page 82 of the record is shown the Warden's Certificate showing execution of said sentence on January 23, 1961, confining the defendant as convict in the Nebraska State Penitentiary to serve said void sentence; and the petition further alleges the unlawful restraint and imprisonment is under and by virtue of the pretended judgment and sentence of the District Court of Morrill County, of November 21, 1960, that the lack of authority to suspend or ignore the Writ of Habeas Corpus was raised by the Original Petition in the District Court of Lancaster County, Nebraska, contrary to Article I, Section 8 of the Constitution of Nebraska, and Article I, Section 9 of the United States Constitution, as shown at page 12 of the transcript.

Those questions were all presented in the Supreme Court of Nebraska in Appellant's Brief on Appeal (pp. 1-4, and pp. 48-50, at page 103 of the transcript, and printed here in Appendix A hereto, infra, pages 28, 29, 30).

The Nebraska Supreme Court did not, however, consider or determine those issues. Instead the Court sets forth the chronological order of events of the suspension of execution of judgment for contempt on December 23, 1960, the issuance by the Clerk of the District Court on November 25, 1960, of the order to the sheriff to execute the sentence and judgment for contempt and the delivery of Paul E. Rhodes to the penitentiary by the sheriff on January 23, 1961.

Subsequently in the opinion, however, the Court concluded Paul E. Rhodes was not being confined in the Nebraska State Penitentiary for the purpose of serving the sentence imposed for contempt, as directed by the order issued by the Clerk of the District Court and under the apparent authority of which he had been delivered to the penitentiary (pp. 82-84, record of transcript. Printed in Appendix A hereto, infra, page 31), but that such confinement was for the purpose of holding Paul E. Rhodes in custody pending determination of the error proceedings from the conviction and sentence for contempt. The excerpts of the opinion here referred to are printed in Appendix A hereto, infra, page 27.

REASONS FOR GRANTING THIS WRIT

The writ of certiorari should be granted herein because of the apparent violations of petitioner's constitutional rights wherein the writ of habeas corpus has been unavailable to petitioner to release him from the involuntary servitude imposed upon him although he has not been convicted of a crime.

We should determine the authority of the Court to grant the Writ of Habeas Corpus, keeping in mind at all times that the purported trial on November 21, 1960, was in absence of petitioner, a trial in absentia.

I.

Where Detention Is Had under a Void Sentence in Contempt, Habeas Corpus Is the Proper Remedy.

The contention of the petitioner in this action is that under a void sentence and where confinement is had under and by virtue of said void sentence, Habeas Cor-

pus is the proper remedy and the Nebraska Supreme Court of Nebraska has so held:

In Re Havlick, 45 Neb. 747, 64 N. W. 234:

> "Where detention is had under a void sentence in contempt, habeas corpus is proper remedy."

II.

Where the Proceedings Are Wholly Void Because of Want of Jurisdiction of the Court over the Subject Matter, or Are Illegal, as Distinguishable from Being Merely Erroneous the Writ of Habeas Corpus Is the Proper Remedy.

The petitioner was not present in court at the time of the alleged trial on November 21, 1960, which goes to the jurisdiction of the court over the body of the relator. *In Re Resler*, 115 Neb. 335, 212 N. W. 765, 766:

> "It is firmly established that if a court or judge thereof renders a judgment, or who enters an order has not jurisdiction to perform the act done either because the proceedings or law under which it is taken is unconstitutional, or for any other reason the judgment is void. It may be questioned collaterally, and the defendant who is imprisoned under and by virtue of it may be discharged."

III.

Where One Is Imprisoned without Legal Authority, upon Making the Same Appear to the Judge of the District Court, It Shall Be His Duty to Forthwith Allow a Writ of Habeas Corpus.

Statute 29-2801, R. R. S. Neb. 1943, Re-issue of 1956, which reads in part as follows to-wit:

> "If any person * * *, shall be unlawfully deprived of his or her liberty and shall make application,

either by himself or by any person on his or her behalf, to any one of the judges of the District Court, * * *, and does at the same time produce to such judge a copy of the commitment or cause of detention of such person, or if the person so imprisoned or detained is imprisoned or detained without any legal authority, upon making the same appear to such judge, by oath or affirmation, it shall be his duty forthwith to allow a Writ of Habeas Corpus, which Writ shall be issued forthwith by the clerk of the district court, * * * under the seal of the court, whereof the person allowing such Writ is judge, directed to the proper officer, person or persons who detains such prisoner."

IV.

A Judgment of Imprisonment in the Penitentiary at HARD LABOR as a Sentence for Contempt of Court Is Involuntary Servitude and Is Void and Violates the Thirteenth Amendment of the Constitution of the United States of America,

U. S. Constitution, Amendment XIII:

"Neither slavery nor involuntary servitude except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States * * *."

V.

Confinement in the Penitentiary on a Charge of Contempt of Court Is Cruel and Unusual Punishment without a Trial by Jury and Violates the Eighth Amendment to the Constitution of the United States of America.

U. S. Constitution, Amendment VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

In *Flannagan* v. *Jepson*, 177 Iowa, 393, 158 N. W. 641 and cited by the Nebraska Supreme Court as the law of the land, *Smolczyk* v. *Gaston*, 147 Neb. 681, opinion by Carter, J., who still sits on the Honorable Supreme Court of Nebraska, the Iowa Court said to-wit:

"The authorities *may be searched in vain* for any precedent, under our constitutional form of government, holding it to be in the power of a state to clothe its courts with authority to visit infamous punishment upon any person for contempt or in any proceeding whatever, other than the orderly process of trial upon indictment or information. The authority to punish for contempt is, of course, quite indispensable to orderly and efficient administration of justice; but the very fact that such authority is subject to no appeal, and its application is summary to a degree bordering on the arbitrary, makes it very essential that it shall not be enhanced to a point where our guarantees are lost sight of."

"To recapitulate: A sentence to infamous punishment in the *penitentiary at hard labor* can be lawfully imposed under our Constitution only as punishment for crime of which the accused has been duly convicted; *one is not duly convicted of crime except* in a proceeding giving opportunity for a jury trial; *a charge of contempt not being a charge of a crime triable by jury, THE COURT IS WITHOUT POWER OR AUTHORITY IN SUCH PROCEEDING* to penalize the contempt by *imposing a sentence which is constitutionally restricted to cases for conviction for crime.*" (Emphasis supplied by writer).

"Ex Parte Wilson, 114 U. S. 417, 5 Sup. Ct. 939."

"For more than a century imprisonment at hard labor—penitentiary—has been considered an infamous punishment in England and America."

and further quotes approvingly the following language of Chief Justice Shaw, *Jones* v. *Robbins*, 8 Gray (Mass.) 329:

> "A sentence to state prison for any term of time must be considered as falling within the meaning of infamous punishment. The convict is placed in a public place of punishment common to the whole state, subject to solitary imprisonment, clothed in conspicuous prison dress, subject to hard labor without pay, to hard fare, to have his hair cropped, coarse and meager food, and to severe punishment."

VI.

A Sheriff Has No Power to Execute Commitment to the Penitentiary After the Judgment on which Said Commitment Is Based Has Been Suspended by Writ of Error of Supreme Court and Judgment Has Not Been Affirmed and the Sheriff Thereafter Directed to Execute the Same.

29-2401, R. R. S. Neb. 1943, Reissue of 1956:

> "Execution of sentence; conviction of felony; delivery of prisoner to penitentiary. Every person sentenced to the penitentiary shall within thirty days, and as early as practicable after his sentence, unless the execution thereof be suspended, be conveyed to the penitentiary of this State by the sheriff of the county in which the conviction took place, and shall there be delivered to the custody of the warden of the penitentiary, together with a copy of the sentence of the court ordering such imprisonment, there to be safely kept until the term of his confinement shall have expired or he shall be pardoned. If execution of sentence be suspended and the judgment afterwards affirmed the petitioner shall be conveyed to the penitentiary within thirty days after the court shall direct the sentence to be executed."

In *State ex rel Hunter*, 135 Neb. 136, 280 N. W. 886:

> "An error proceeding or criminal case does not suspend the sentence within the legal meaning of that term, but does stay the execution of sentence."

The sheriff had no authority to deliver petitioner to the Warden of the State Penitentiary, Maurice Sigler, as shown by the Receipt on page 82 of the Transcript (page 33, Appendix A).

VII.

That Execution of a Sentence to the Penitentiary After the Issuance of Writ of Error by the Supreme Court and Suspension of Said Sentence Is a Denial of Due Process of Law and Violates the Fourteenth Amendment of the Constitution of the United States of America and the Equal Protection of the Law Provisions of the Constitution.

U. S. Constitution, XIV Amendment:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

The Supreme Court of Nebraska in its opinion herein makes the following statement, to-wit:

> "We think it clear from the 21st of November, 1960, when the contempt judgment was rendered, the relator was subject to be taken into custody and held pending further orders of this court." (page 27, Appendix A).

This language is in error and ignores the Fourth Amendment to the Constitution of the United States which reads as follows:

> "The right of people to be secure in their person, houses, papers, and effects, against unreasonable search and seizure, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

This amendment is applicable to the States by virtue of the Fourteenth Amendment of the Federal Constitution.

The United States Supreme Court affirms this doctrine in *Monroe* v. *Pape*, 81 S. Ct. 473, with the following language:

> "Fourth Amendment's guarantee against unreasonable search and seizures is applicable to the states by reason of due process of law clause of the fourteenth Amendment. U.S.C.A., *Constitutional Amendments, 4, 14.*"

The Court further held in *Monroe v. Pape*, supra:

> "Congress has power to enforce Fourteenth Amendment against those who carry badge of authority of a state and representation in some capacity, whether they act in accordance with their constitutional authority or misuse it."

A state court that does not have jurisdiction over the body in a proceeding in rem, such as contempt, does not have jurisdiction where the defendant is not present in Court at trial time, has no jurisdiction to impose sentence and enforce same in any manner and the sheriff would have no authority without a warrant to deprive the relator of his liberty, and to execute said sentence.

There is nothing in the record anywhere to support the following purported statement of fact in the opinion of the Nebraska Supreme Court:

> "He is not being held as one serving the sentence imposed in that action." (page 27 in Appendix A)

This has never been the contention of the respondent. The respondent has proceeded to enforce said sentence to the letter, has placed the petitioner on the records of the Nebraska State Penitentiary, as Convict Number 21675, has so entered him on the F.B.I. files in Washington, D. C., has placed petitioner in a public place of punishment common to the whole state, subjected him to solitary imprisonment, clothed in conspicuous prison dress, subjected to hard labor without pay, to hard fare, cropped petitioner's hair, furnished petitioner coarse and meager food, imposed severe punishment on petitioner, confined petitioner in the penitentiary hole (dungeon), credited the petitioner with diminution of sentence for good behavior as provided by 29-2632, R. R. S. Neb. 1943, furnished petitioner the date of July 5, 1961, when the lawful requirements of the sentence would have been completed, and, at no time has pretended to hold petitioner for the sheriff of Morrill County, Nebraska, under Section 29-1001, R. R. S. Neb. 1943. Respondent had informed petitioner that he would be discharged as having completed the terms of the sentence on July 5, 1961, and, respondent has pursuant to 29-2627, R. R. S. Neb. 1943, as amended, tailor made a suit in preparation for said release as a convict.

VIII.

The Courts Do Not Have Authority to Suspend the Writ of Habeas Corpus.

Article I, Section 9 of the Constitution of the United States:

> "Habeas Corpus. The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it, and then only in such manner as shall be prescribed by law."

The District Court of Morrill County, Nebraska, at no time ordered the rearrest or the taking into custody of the petitioner herein contrary to the discharge in habeas corpus entered by the county court of Morrill County, Nebraska, on September 2, 1960 (pp. 13-16 in Transcript) and at no time authorized or ordered any officer to deprive petitioner of his liberty and all was done without any order of court authorizing the same and in defiance of the Suspension granted by the Supreme Court entered December 23, 1960.

Nowhere does the record disclose that, pursuant to the suspension of the contempt sentence, bond was ever set by the District Court of Morrill County, Nebraska.

I suggest to the Court that the United States of America is "a government of laws and not men" but when the writ of habeas corpus is suspended contrary to Article I, Section 9 of the United States Constitution, making it impossible to be released from *involuntary servitude* imposed contrary to the Thirteenth Amendment to the Constitution of the United States, the foregoing fundamental legal principle would seem to be scrapped.

The Supreme Court of Nebraska has erroneously failed to give application to the above principles and has erroneously failed to consider the Constitutional rights of petitioner under the Constitution of the United States as above set forth and not in accord with applicable decisions of this Court, particularly the case of *Monroe v. Pape*, 81 S. Ct. 473 (1961), holding that arrest without a warrant is a violation of the Federal Civil Rights Act and that the Fourth Amendment of the U. S. Constitution guarantees are applicable to states by reasons of the Due Process of Law Clause of the Fourteenth Amendment of the U. S. Constitution.

Petitioner heretofore submitted a *Certificate of Justice of State Court that Constitutional Question Was Considered* to the Honorable Robert G. Simmons, Chief Justice of the Supreme Court of Nebraska (infra, Appendix A, pages 34-35) together with a Certificate of Justice of State Court of Finality of Judgment (infra, Appendix A, page 36) but such certificates were returned to petitioner, unexecuted, by the Clerk of the Supreme Court of Nebraska (infra, Appendix A, page 37).

CONCLUSION

For the foregoing facts and reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL E. RHODES, Pro Se,
Convict No. 22107,
Nebraska State Penitentiary,
Lincoln, Nebraska.

APPENDIX A

Opinion from The Nebraska Supreme Court. Rhodes v. Sigler. 172 Neb. 439.

PAUL E. RHODES, APPELLANT, v. MAURICE SIGLER, APPELLEE

— N. W. 2d —

Filed June 23, 1961. No. 35029

APPEAL from the district court for Lancaster County: PAUL W. WHITE, JUDGE. *Affirmed.*

Paul E. Rhodes, W. H. Kirwin, and *Clayton H. Schrout,* for appellant.

Clarence A. H. Meyer, Attorney General, and *Cecil S. Brubaker,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SIMMONS, C. J.

This is a habeas corpus action. Relator is being held in custody at the penitentiary. The respondent is the warden of the penitentiary. The trial court denied release from custody of the relator. He appeals. We affirm the judgment of the trial court.

The relator is a defendant in a felony case pending in the district court for Morrill County. Following a series of actions and conduct in the courts of and for Morrill County, the district court there found relator guilty of contempt of the court and sentenced him to confinement in the Nebraska State Penitentiary for a period of 9 months at hard labor, Sundays and holidays excepted, and to pay a fine of $2,500 and costs.

Relator then filed a petition in error and a transcript of the proceedings in this court. In that case on motion of the relator we suspended the execution of the judgment and directed the district court for Morrill County to admit the relator to bail. This order was issued December 23, 1960.

In the meantime on November 25, 1960, the clerk of the district court for Morrill County had issued an order to the sheriff of Morrill County to execute the sentence and order of the court. On January 23, 1961, the sheriff delivered the relator to the penitentiary where he is now held.

Relator here argues that he was tried for contempt in his absence and that no order was issued for the arrest of the relator by the trial court. He contends that the order of commitment was unauthorized and that he is being held under a sentence of the trial court which has been suspended by this court.

The district court for Lancaster County issued an order to show cause. Hearing was had on the question of whether a writ should be issued. The issuance of the writ was denied. This is an appeal from that denial.

Relator apparently has elected not to ask to be admitted to bail. His petition in error here presented questions which arose prior to his delivery to the penitentiary.

The jurisdiction of the cause is in this court in the error proceedings from Morrill County. The trial court properly refused to issue a writ under the rules stated in McFarland v. State, *ante* p. 251, — N. W. 2d —: It is the general rule that a court is without jurisdiction where it attempts by habeas corpus to interfere with

the exercise by another court of jurisdiction theretofore acquired, whether such jurisdiction is acquired in another habeas corpus proceeding or on appeal, or otherwise, unless the prior jurisdiction has been terminated. A writ of habeas corpus can be granted only by a court having jurisdiction, and the exercise of power to grant the writ cannot be used to unsettle valid legal proceedings, or to interfere with the exercise of jurisdiction of other courts.

We need not determine here whether the issuance of the order of commitment on November 25, 1960, was regular or irregular. As to that the rule is: If the proceedings subsequent to conviction are erroneous, such errors can be reviewed and corrected by proceedings in error in the regular course of the law, but not by the writ of habeas corpus. In re Application of Cole, 103 Neb. 802, 174 N. W. 509.

We think it clear that from the 21st of November 1960, when the contempt judgment was rendered, the relator was subject to be taken into custody and held pending further orders of the court. Our order suspending the sentence did not suspend liability to that custody save and until the relator was admitted to bail. Relator is now being held in custody pending the determination of error proceedings from Morrill County. He is not being held as one serving the sentence imposed in that action.

It appears from this showing that the sheriff had full authority under the provisions of section 29-1001, R. R. S. 1943, to hold relator in a "secure and convenient place of confinement." If there is error in the determination it is a matter to be corrected in an error proceeding and not in habeas corpus. It has long been the

rule that: The writ of habeas corpus is not a writ for the correction of errors, and will not be allowed to be used for that purpose. In re Application of Cole, *supra*.

The judgment of the district court for Lancaster County is affirmed.

AFFIRMED.

Excerpts from Rhodes v. Sigler, 172 Neb. 439.

Nebr. Vol. 172, p. 440; Rhodes v. Sigler:

"The relator is a defendant in a felony case pending in the district court for Morrill County. Following a series of actions and conduct in the courts of and for Morrill County, the district court there found relator guilty of contempt of court and sentenced him to the Nebraska State Penitentiary for a period of 9 months at hard labor, Sundays and holidays excepted, and to pay a fine of $2,500.00 and costs.

"Relator then file a petition in error and a transcript of the proceedings in this court. In that case on motion of the relator we suspended the execution of the judgment and directed the district court for Morrill County to admit the relator to bail. This order was issued December 23, 1960.

In the meantime on November 25, 1960, the clerk of the district court for Morrill County had issued an order to the sheriff of Morrill County to execute the sentence and order of the court. On January 23, 1961, the sheriff delivered the relator to the penitentiary where he is now held."

"We think it clear that from the 21st of November, 1960, when the contempt judgment was rendered, the relator was subject to be taken into custody and held pending further orders of the court. Our order suspending the sentence did not suspend liability to that custody save and until the relator was admitted to bail. Relator is now being held in custody pending the determination of error proceedings from Morrill County. He is not being held as one serving the sentence imposed in that action."

Questions in Appellant's Brief to the Supreme Court of Nebraska.

The question involved in this action is whether after a trial in absence of defendant in a contempt proceeding and no order issued for the arrest of defendant, he not being in custody and not within the jurisdiction of the court; the court enters an order finding defendant guilty in his absence and sentences him to the penitentiary at hard labor for contempt of court, and the court does not order him into custody, is the Clerk of the Court authorized to issue a commitment to penitentiary without order of court therefore, and the Supreme Court thereafter suspends the execution of said sentence, and thereafter without a warrant or order of court the defendant is taken into custody by force, and thereof the commitment is executed by the sheriff and Warden of the penitentiary without any order for execution of the sentence, is the defendant as relator in a District Court Habeas Corpus proceeding entitled to a Writ of Habeas Corpus and discharge from custody? (See page 48 for additional Questions Involved.)

ADDITIONAL QUESTIONS INVOLVED

2. That a trial in absentia, in absence of defendant, is a nullity, absolutely void, and relator imprisoned thereunder is entitled to discharge upon habeas corpus.

3. There is no power or authority to arrest on a commitment; it is not a warrant for purposes of arrest.

4. After suspension of sentence by Supreme Court on error proceedings the sheriff has no authority to execute a commitment issued prior to said suspension

without further order of the court directing its execution.

5. Where sentence is executed after suspension by the Supreme Court and confinement had in the penitentiary contrary to the suspension habeas corpus is the proper remedy for discharge and release.

6. A sentence for contempt of court at hard labor in the penitentiary is absolutely void in Nebraska and a violation of Article I, Sec. 2 of Nebraska Constitution and thirteenth amendment to Constitution of United States and due process of law clause of both said Constitutions and defendant imprisoned thereunder at hard labor is entitled to writ of habeas corpus and discharge thereunder.

7. That the clerk of the court is not authorized to issue writ of commitment to penitentiary where defendant is not in custody and there is no order of court directing that he be taken into custody.

8. Where detention is had under a void sentence habeas corpus is proper remedy.

9. Where imprisonment is being suffered under judgment for contempt is habeas corpus the proper proceeding for inquiry into the question of jurisdiction?

10. Where proceedings are wholly void for want of jurisdiction over the subject matter or wholly illegal is habeas corpus proceedings the proper procedure for release from said unlawful imprisonment and involuntary servitude?

11. Does the court in a prosecution for criminal contempt have jurisdiction to try defendant in his absence, make a finding of guilty and pass sentence?

12. Do the rules which govern criminal prosecutions apply to prosecutions for criminal contempt?

13. The court has no jurisdiction to sentence to the penitentiary at hard labor in Nebraska for contempt of court, no trial by jury being allowed in contempt proceedings.

14. That the court has no jurisdiction of the subject matter in a contempt proceeding at time of trial when alleged defendant is not in court.

15. That where defendant is imprisoned on an executed sentence of involuntary servitude contrary to Article I, Section 2 of Nebraska Constitution and thirteenth amendment to Constitution of United States of America habeas corpus is the proper remedy for release from said unlawful imprisonment, and when he has been denied due process of law.

16. That the court is without jurisdiction to order confinement in the penitentiary in Nebraska for contempt of court for reason pursuant to Article I, Section 11 of Nebraska Constitution and the Constitution of United States of America, sixth amendment, no imprisonment may be made to penitentiary without trial by jury; trial by jury is not allowed in criminal contempt proceedings in Nebraska and that therefore any confinement in the penitentiary for contempt of court is a denial of due process of law pursuant to Article I, Section 3, Nebraska Constitution and fourteenth amendment to Constitution of United States of America.

Commitment, Sheriff's Return and Warden's Receipt.

STATE OF NEBRASKA,)
) ss.
MORRILL COUNTY)

The State of Nebraska, Morrill County.

To the Sheriff of said County:

WHEREAS: At a regular term of the District Court for said county, which term was begun and held at the Court House, in Bridgeport, in said county, on the 18th day of April 1960; Present, the Hon. R. M. Van Steenberg one of the judges of said court;

AND, WHEREAS, Clarence S. Beck, Attorney General for the State of Nebraska, on the 29th day of July 1960, came into Court, and presented a certain information in due form of law, against Paul E. Rhodes for Contempt of Court which information was by order of the Court filed and the cause docketed; and afterwards on the 6th & 7th days of September and the 21st day of November, 1960, further proceedings were had upon said information, to wit:

ON TRIAL TO THE COURT the said Paul E. Rhodes was put upon his trial, and the said Court entered a Judgment of "Guilty of Contempt as charged".

AND, WHEREAS. On the 21st day of November 1960, the said Paul E. Rhodes was then by the said judge sentenced, in these words: "IT IS THEREFORE ORDERED AND ADJUDGED that the defendant, Paul E. Rhodes, is guilty of contempt of court as charged and is hereby sentenced to confinement in the Nebraska State Penitentiary at Lincoln, Nebraska, for a period of

nine (9) months at hard labor, Sundays and holidays excepted, and to pay a fine in the amount of two thousand five hundred dollars ($2,500.00) and the costs of this proceeding.".

You are therefore commanded to proceed to execute the said sentence and order of the Court.

WITNESS, my hand and seal of said Court, at Bridgeport, Nebraska, this 25th day of November, 1960.

(SEAL) (Signed) Virginia A. Schuetz
Clerk District Court.

COMMITMENT

DISTRICT COURT

County, Neb.

THE STATE OF NEBRASKA,

vs.

FILED January 24, 1961

(Signed) Virginia A. Schuetz

Clerk District Court

State of Nebraska)
) ss.
County of Morrill)

Received this Commitment on the 25th day of November, 1960 and as commanded by this commitment I on the 23rd day of January, 1961 delivered the within named Paul E. Rhodes to the Nebraska Penitentiary at Lincoln, Nebraska.

Dated this 24th day of January, 1961.

(Signed) Norval E. Houston, Sheriff

Mileage	820	$ 66.60
Meals & Room		16.80
Filed for with County		$ 83.40

NEBRASKA STATE PENITENTIARY

Lincoln, Nebraska, Jan. 23, 1961

To the Clerk of Court:

This Doth Certify, That Norval E. Houston, Sheriff of Morrill County, Nebraska, did, on the day of the date hereof, deliver to the Nebraska State Penitentiary, at Lincoln, Nebraska, the body of Paul E. Rhodes who was tried, convicted, and sentenced at the April Term, 1960, of the District Court of said County, held at Bridgeport, Nebraska, April 18, 1960.

(Signed) Maurice H. Sigler
Warden of Penitentiary

Appendix

Certificate of Justice that Constitutional Question Was Involved (unexecuted).

SUPREME COURT OF THE UNITED STATES
from SUPREME COURT OF NEBRASKA

PAUL E. RHODES, Petitioner

vs.

MAURICE SIGLER, Respondent

CERTIFICATE OF JUSTICE OF STATE COURT THAT CONSTITUTIONAL QUESTION WAS CONSIDERED

I, Robert G. Simmons, Chief Justice of the Supreme Court of Nebraska, hereby certify:

That in the above entitled cause the questions whether the Writ of Habeas Corpus is suspended in Nebraska as against a District Court contempt of court proceeding wherein the defendant in said Contempt proceeding is tried without a jury, and Sentenced to Imprisonment in the Nebraska State Penitentiary for nine (9) months at HARD LABOR, and said trial was conducted, in the absence of the defendant and his attorneys, and said judgment was entered without a trial by jury in the absence of the defendant, sentence to imprisonment in the State Penitentiary at Hard Labor and fine of $2,500.00 and costs for the offense of contempt of court, to sentence to hard labor for the offense of contempt of court, to refuse to recognize a Writ of Habeas Corpus previously granted and unappealed from and a final judgment, to arrest without a warrant and commit to the penitentiary to serve said sentence at hard labor as a convict, after said sentence had been suspended by the Supreme Court of the State of Nebraska

in an Error proceeding, and had not been remanded to the District Court with directions to execute said sentence, is repugnant to the provisions of United States Constitution Article I, Section 9 and IV, V VI, VIII, XIII, XIV Section 1, Amendments to the Constitution of the United States, Article I, Section 9 providing "* * * The privilege of the Writ of Habeas Corpus shall not be Suspended * * *"; and Amendments IV "The right of the people to be secure in their persons * * * against unreasonable search and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing * * * the persons or things to be seized"; and Amendment VI "In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * * to be confronted with the witnesses against him * * *"; and Amendment VIII "Excessive bail shall not be required, no excessive fines imposed, nor cruel and unusual punishments inflicted"; Amendment XIII "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction"; and Amendment XIV "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," was considered and passed upon by this court.

Dated October , 1961.

Chief Justice of Nebraska Supreme Court

Attest:

Clerk of Nebraska Supreme Court

Certificate of Justice of State Court of Finality of Judgment (unexecuted).

SUPREME COURT OF THE UNITED STATES
FROM SUPREME COURT OF NEBRASKA

PAUL E. RHODES, Petitioner

vs.

MAURICE SIGLER, Respondent

CERTIFICATE OF JUSTICE OF STATE COURT
FINALITY OF JUDGMENT

I, Robert G. Simmons, presiding Chief Justice of the Supreme Court of Nebraska, hereby certify:

That the Supreme Court of Nebraska is the highest court of this state in which a decision in the above entitled suit could be had, The Supreme Court of the State of Nebraska having denied a rehearing therein, and that upon affirmance by said Supreme Court of Nebraska, the judgment in said cause became final on the same day after the same was pronounced leaving Nothing to be done by the Court below, but to Execute the judgment already rendered, which disposes of all the elements of controversy, and that the rehearing therein was denied on Friday, October 13, 1961, A.D.

Dated this day of October, 1961.

Chief Justice of Supreme Court of Nebraska

Attest:

Clerk of Supreme Court of Nebraska

Letter from Clerk of Nebraska Supreme Court

STATE OF NEBRASKA
SUPREME COURT

November 28, 1961

Paul E. Rhodes,
Box 47,
Howe, Nebraska.

In re Rhodes v. Sigler, No. 35029.

Dear Sir:

Inclosed herewith is your transcript on certiorari to the Supreme Court of the United States in the above case, together with statement for the cost thereof.

Section 29 - 2824 does not provide that there shall be no costs in habeas corpus action, but only that a Clerk may not demand his fees in advance. I believe that in any case this does not apply in your case because it relates only to a habeas corpus action where a person is seeking discharge from custody "in any criminal case."

I do not find anything in the Rules of the Supreme Court of the United States either requiring or authorizing certificates from the Chief Justice such as you tendered to me when you were last in the office and for this reason I am returning them herewith, unsigned.

Yours truly,

(Signed) George H. Turner
Clerk.

Inc.
GHT-G.

Rehearing Denied.

And afterwards, to-wit, on the 13th day of October, 1961, there was rendered by said Supreme Court of Nebraska, and entered of record upon Journal RRR thereof, at page 249, a certain ORDER, in the words and figures following, to wit:

Oct. 13.

Paul E. Rhodes, Appellant.

v.

Maurice Sigler, Appellee.

Appeal from the District Court of
Lancaster County. No. 35029.

This cause coming on to be heard upon motion of appellant for a rehearing herein, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, considered, ordered and adjudged that said motion for rehearing be, and hereby is, overruled and a rehearing herein is denied.

Robert G. Simmons
Chief Justice.

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In The

Supreme Court of the United States

October Term, 1961

No. 651

PAUL E. RHODES, PETITIONER,

V.

MAURICE SIGLER, RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

CLARENCE A. H. MEYER,
Attorney General, State of Nebraska,
Capitol Building, Lincoln, Nebraska,
CECIL S. BRUBAKER,
Assistant Attorney General, State of Nebraska,
Capitol Building, Lincoln, Nebraska.

Counsel for Respondent.

JOE CHRISTENSEN PRINTING, 1521 O Street, Lincoln 8, Nebr.

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In The

Supreme Court of the United States

October Term, 1961

No. 651

PAUL E. RHODES, PETITIONER,

V.

MAURICE SIGLER, RESPONDENT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

CLARENCE A. H. MEYER,
Attorney General, State of Nebraska,
Capitol Building, Lincoln, Nebraska,
CECIL S. BRUBAKER,
Assistant Attorney General, State of Nebraska,
Capitol Building, Lincoln, Nebraska,
Counsel for Respondent.

OPINION BELOW

The opinion of the Nebraska Supreme Court, here sought to be reviewed, is entitled Paul E. Rhodes, Ap-

pellant, v. Maurice Sigler, Appellee, is case No. 35092, and is reported in 172 Neb. 439, and 109 N. W. 2d 731. The opinion, except for the syllabus by the court, is printed in Appendix A to the brief of the petitioner herein, at page 23.

JURISDICTION

The respondent accepts, as substantially correct, the statement of the petitioner as to the grounds on which he seeks to invoke jurisdiction of this court.

STATUTE INVOLVED

Reissue Revised Statutes of Nebraska of 1943, Section 29-1001:

> "Whenever it shall be lawful and necessary to confine any prisoner in custody previous to conviction upon a criminal accusation, or in custody for contempt or alleged contempt of court, or upon an attachment by order of a court or judge, or otherwise in lawful custody, or upon conviction for any offense, the officer or person having him in such custody may convey him to and confine him in the jail of any county in this state or other secure and convenient place of confinement in this state, to be procured by such officer or person having such prisoner in custody."

QUESTION PRESENTED FOR REVIEW

Whether the denial of a writ of habeas corpus to the petitioner involved the decision of any federal question of substance, when petitioner was held in custody after lodging of error proceeding and upon his failure to post bail after suspension of execution of a sentence of imprisonment for contempt of court.

STATEMENT OF THE CASE

On November 21, 1960, the petitioner, Paul E. Rhodes, a lawyer, was found guilty of contempt of court by the District Court of Morrill County, Nebraska, and sentenced to be imprisoned in the Nebraska State Penitentiary for nine months, at hard labor, Sundays and holidays excepted, and to pay a fine of $2,500, and costs (R.9). Commitment was issued on November 25, 1960 (R.83). The petitioner perfected an error proceeding to the Supreme Court of Nebraska in the contempt action, and on December 23, 1960, the Supreme Court issued a writ of error, which suspended the execution of the sentence for contempt, and directed that the District Court of Morrill County admit the petitioner to bail (R.81). On January 23, 1961, the sheriff of Morrill County delivered the petitioner to the penitentiary (R. 82,84).

Petitioner did not request that the amount of bail be set, nor attempt to make bail, but, on January 26, 1961, the petitioner filed a petition for writ of habeas corpus in the District Court of Lancaster County, Nebraska (R.9). The allegations were that the petitioner was unlawfully imprisoned under a judgment and sentence of the District Court of Morrill County, Nebraska, for the reasons that the district court had no jurisdiction, power or authority, (a) to try the case in the absence of the defendant, (b) to enter judgment and pass sentence in the absence of the defendant, (c) to pronounce sentence of imprisonment in the Nebraska State Penitentiary for nine months, at hard labor, and fine of $2,500 and costs, for the offense of contempt of court, (d) to sentence to hard labor for such offense, (e) to try the case when the judge was disqualified to sit,

(f) to try the case after the court had been divested of jurisdiction by a habeas corpus action in the county court releasing defendant and discharging him from custody and from the charge of contempt, and (g) to try or to sentence the petitioner because he was "in custodia legis" during an appeal of another habeas corpus proceeding which freed him from imprisonment under another separate charge, and was therefore immune from prosecution for contempt.

The petition contained an allegation in paragraph 2 thereof that the court had no jurisdiction, power or authority to pronounce a sentence at hard labor for the reason that such a sentence violates the 13th Amendment to the Constitution of the United States. The petition further alleged, in paragraph 4 thereof, that the judgment of November 21, 1960, was an attempt to suspend or ignore the writ of habeas corpus, contrary to Article I, Section 9 of the Constitution of the United States, and was "an attempt to deprive the relator of his civil rights guaranteed by said Constitutions." These were the only allegations of violation of constitutional rights, privileges or immunities.

The District Court of Lancaster County, Nebraska denied the writ of habeas corpus on the same day of its filing (R.85), holding that jurisdiction in the error proceeding had lodged in the Supreme Court, and that the district court was without authority to interfere with that jurisdiction by habeas corpus. The petitioner appealed to the Supreme Court from this judgment of the district court denying the writ, and the Supreme Court affirmed the holding of the district court, in an opinion reported in 172 Neb. 439, 109 N. W. 2d 731. The opinion, except for the syllabus by the court, is

reproduced at Appendix A of the brief of the petitioner in this action, page 23.

The Supreme Court of Nebraska held that jurisdiction in the contempt case had been lodged in the Supreme Court by error proceedings; that the district court therefore had no jurisdiction to interfere with the previous jurisdiction by habeas corpus; that the writ of habeas corpus was not to be used for the correction of errors. The Supreme Court further found that it had suspended the execution of the sentence for contempt, but that that order did not suspend liability to custody save and until the petitioner was admitted to bail; that petitioner apparently had elected not to ask to be admitted to bail; that the custody of the petitioner was not for the purpose of serving the sentence imposed, but was within the statutory authority of the sheriff, pending determination of the error proceedings in the contempt case.

Motion for re-hearing was overruled, and the petitioner now applies to this court for writ of certiorari.

ARGUMENT

I.

The District Court of Lancaster County Had No Jurisdiction or Authority to Interfere by Habeas Corpus with the Jurisdiction of the Supreme Court Previously Acquired in Error Proceeding.

By his application for writ of habeas corpus made to the District Court of Lancaster County, Nebraska, the petitioner sought to be released from the custody of the Warden of the State Penitentiary where he had been placed by the sheriff of Morrill County, Nebraska, fol-

lowing judgment and sentence for contempt and commitment issued thereon from the District Court of Morrill County. Petitioner had lodged an error proceeding in the contempt action with the Supreme Court of Nebraska, and writ of error had been issued, suspending the execution of the sentence and directing that the petitioner be admitted to bail.

At the time of the application for writ of habeas corpus the petitioner had made no application for bail to the District Court of Morrill County, apparently electing, instead, to suffer custody and seek the writ of habeas corpus.

The District Court of Lancaster County and the Supreme Court of Nebraska each held that jurisdiction to determine the issues raised by the petition for habeas corpus had been previously lodged in the Nebraska Supreme Court in the error proceeding there pending, and which had been initiated by the petitioner himself, and that the district court was therefore without authority to interfere with that jurisdiction by writ of habeas corpus.

In reaching that decision, it was not necessary to decide the merits of the allegations of the petition for writ of habeas corpus relating to claimed errors in the court proceeding for contempt. Petitioner had already obtained a suspension of the execution of the sentence, conditioned upon the posting of bail. The claim of illegal restraint in the petition for writ of habeas corpus is based on allegations of illegality in the proceedings and sentence of the court. The matters sought to be brought before the district court were matters already before the Supreme Court in the error proceeding instituted by the petitioner himself.

The rule which was applied by both the District Court of Lancaster County and the Nebraska Supreme Court in denying the writ of habeas corpus is stated in 39 C. J. S., Habeas Corpus, Sec. 53, p. 596, as follows:

> "Pursuant to a general rule of wide application, on which there is no conflict of authorities, it has been held that a court is without jurisdiction where it attempts by habeas corpus to interfere with the exercise by another court of jurisdiction theretofore acquired, whether such jurisdiction is acquired in another habeas corpus proceeding or on appeal, or otherwise, unless the prior jurisdiction has been terminated. * * *
>
> "* * * * * *."

Virtually the same rule is stated in 25 Am. Jur., Habeas Corpus, Sec. 108, p. 223.

Previous to its decision in the instant case, the Nebraska Supreme Court had applied this general rule in the case of *McFarland* v. *State*, 172 Neb. 251, 109 N. W. 2d 397, and reference is made to the *McFarland* case and the rules therein stated in the reported opinion of this case, 172 Neb. 439, 441, and as shown in the appendix to the brief of the petitioner herein at page 24. The *McFarland* case is the companion case to the contempt action here involved, and was an action for contempt against the county judge who had collaborated with this petitioner in issuing the writ of habeas corpus which petitioner refers to in paragraph 4 of his petition for writ of habeas corpus to the Lancaster County District Court (R.9). In affirming the conviction of the county judge, the Nebraska Supreme Court held that the writ of habeas corpus was void and that the proceedings attempted thereunder were void.

In so holding, the Nebraska Supreme Court quoted and approved *Peff* v. *Doolittle*, 235 Iowa 443, 15 N. W. 2d 913, as follows:

"* * * * *

"* * *. As valuable and important a right as is the writ of habeas corpus, and as essential as it is in guarding and preserving human liberty, yet, like any other order or judgment of a court, it can be granted only by a court having jurisdiction. Nor can the exercise of this power to grant the writ be used to unsettle valid legal proceedings or to interfere with the exercise of the jurisdiction of other courts.

"* * * * *."

The court also quoted and approved a Missouri case, *State ex rel. Bressman* v. *Theisen*, (Mo. App.) 142 S. W. 1088, as follows:

"Where one court has competent jurisdiction of the person and is proceeding to exercise it, it would be a great outrage upon the administration of justice if a court of equal or inferior jurisdiction should by virtue of the writ of habeas corpus seek to override the jurisdiction of the former, by discharging the person and thus annulling its writs and processes and rendering abortive any judgment it might lawfully render."

The Nebraska court also pointed out cases to the same effect, i. e., *Hart* v. *Best*, 119 Colo. 569, 205 P. 2d 787; *Zimmerman* v. *Angele*, 137 Colo. 129, 321 P. 2d 1105; *Commonwealth* v. *Gordon*, 197 Ky. 367, 247 S. W. 45; *Spurrier* v. *Spurrier*, 111 Okl. 242, 238 P. 956; *State* v. *Callahan*, 93 Kan. 172, 144 P. 189.

We think it is clear that once the petitioner himself had chosen the forum for determination of the legality

of the proceedings in the contempt action by lodging a proceeding in error in the Supreme Court, he could not, under the rules just stated, interfere with that jurisdiction by an action in habeas corpus.

II.

The Custody of the Petitioner Was Not for the Purpose of Serving the Sentence Under the Contempt Proceeding.

The allegations of the petition for writ of habeas corpus go no further than to allege illegal restraint under a warrant of commitment issued on the judgment and sentence of the district court, which was claimed to be void for the several reasons set out in the petition. It was the petitioner's position in the Supreme Court of Nebraska, as it is here, that he was serving the sentence imposed upon him. This is apparently based, so far as the record is concerned, upon the return of the sheriff on the commitment issued previous to the lodging of error proceedings, and the receipt of the warden of the penitentiary, showing receipt of petitioner. Petitioner attempts to inject argument as to how he was thereafter treated, to show that he was serving the sentence, but none of these matters, whether true or not, appear anywhere in the record.

The Nebraska Supreme Court, recognizing in its opinion (*Rhodes* v. *Sigler*, Supra) that the petitioner contended the order of commitment was unauthorized and that he was being held under a sentence of the trial court which had been suspended by that court, held as follows:

"* * * * *

"We need not determine here whether the issu-

ance of the order of commitment on November 25, 1960, was regular or irregular. As to that the rule is: If the proceedings subsequent to conviction are erroneous, such errors can be reviewed and corrected by proceedings in error in the regular course of the law, but not by the writ of habeas corpus. In re Application of Cole, 103 Neb. 802, 174 N. W. 509.

"We think it clear that from the 21st of November 1960, when the contempt judgment was rendered, the relator was subject to be taken into custody and held pending further orders of the court. Our order suspending the sentence did not suspend liability to that custody save and until the relator was admitted to bail. Relator is now being held in custody pending the determination of error proceedings from Morrill County. He is not being held as one serving the sentence imposed in that action.

"It appears from this showing that the sheriff had full authority under the provisions of section 29-1001, R. R. S. 1943, to hold relator in a 'secure and convenient place of confinement.' If there is error in the determination it is a matter to be corrected in an error proceeding and not in habeas corpus. It has long been the rule that: The writ of habeas corpus is not a writ for the correction of errors, and will not be allowed to be used for that purpose. In re Application of Cole, *supra*.

"* * * * *"

The court was there telling the petitioner that his assumption that he was serving the sentence imposed by the trial court was in error, and was explaining the basis under which he was held, as well as pointing out the statutory basis for such custody. Section 29-1001, R. R. S. Nebr. 1943, is set out in full in a previous portion of this brief.

CONCLUSION

Jurisdiction in the contempt proceeding against the petitioner had been lodged in the Nebraska Supreme Court by error proceeding instituted by the petitioner himself. The District Court of Lancaster County, Nebraska, had no jurisdiction to interfere with that previous jurisdiction by habeas corpus action. It was not necessary to determine any of the claimed violations of constitutional rights, privileges and immunities, because of that previous jurisdiction, and because the custody of the petitioner was not custody for the purpose of serving the sentence under the contempt proceeding, but was custody to which he was subject pending the determination of the error proceeding, unless he should post bail.

The respondent respectfully suggests that the denial of the writ of habeas corpus to this petitioner did not involve the decision of any federal question and should not be reviewed by this court.

Respectfully submitted,

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March, 1962.

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FILED
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No. 651

In The

Supreme Court of the United States

October Term, 1961.

PAUL E. RHODES, PETITIONER,

V.

MAURICE SIGLER, RESPONDENT.

REPLY AND SUPPLEMENTAL BRIEF or in the alternative to be considered as an original application to this court for Writ of Habeas Corpus.

PAUL E. RHODES, *pro se*,
Convict No. 22107,
Nebraska State Penitentiary.

Infamous punishment without being tried for or convicted of a crime.

JOE CHRISTENSEN PRINTING, 1521 O Street, Lincoln 8, Nebr.

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No. 651

In The

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October Term, 1961.

PAUL E. RHODES, PETITIONER,

V.

MAURICE SIGLER, RESPONDENT.

REPLY AND SUPPLEMENTAL BRIEF or in the alternative to be considered as an original application to this court for Writ of Habeas Corpus.

QUESTIONS PRESENTED FOR REVIEW

Questions are as set out in petitioner's petition and certainly contain a Federal question; deprivation of Federal Civil Rights contrary to the United States Constitution where petitioner was tried in absentia and as stated at page 3 of appellee's brief in the Nebraska Supreme Court, respondent in this action stated: "at the time of the granting of the writ of error, the Supreme Court also suspended execution of sentence. . ." Thereafter the sheriff of Morrill County took the appellant into custody and incarcerated him in the Ne-

braska State Penitentiary. The questions are set out in petitioner's petition and presents the Federal questions of Involuntary Servitude and denial of due process and equal protection of the law and arrest without a warrant are Federal questions involving the IV, V, VIII, XIII and XIV amendments of the United States Constitution.

STATEMENT OF THE CASE

The respondent raises in his brief in this court Section 29-1001, R. R. S. Neb. 1943, the first time this section of the Statute was raised or came into the litigation was in the opinion of the Nebraska Supreme Court. A check of the record will reveal that it was not raised by respondents in the Lancaster County District Court or in his brief to the Nebraska Supreme Court, and nowhere did the respondent claim in the Lancaster County District Court, or in his brief to the Nebraska Supreme Court that petitioner was not serving the sentence. The commitment contained in petitioner's petition in this court, appendix pp. 31-32 shows the clerk of the Morrill County District Court filed the return commitment executed by the sheriff on January 24. 1961; further at p. 33 the appendix contains a copy of the sheriff's return to the executed commitment:

> "Received this Commitment on this 25th day of November, 1960 *and as commanded by this commitment* I on the 23rd day of January, 1961 delivered the within named Paul E. Rhodes to the Nebraska Penitentiary at Lincoln, Nebraska."

which shows exact execution of the commitment pursuant to its terms in plain common English. Then in petitioner's petition, appendix p. 33, we have respondent's receipt to-wit (R.82):

"NEBRASKA STATE PENITENTIARY

Lincoln, Nebraska, Jan. 23, 1961.

To the Clerk of the Court:

This Doth certify, That Norval E. Houston, Sheriff of Morrill County, Nebraska, did on the date hereof, deliver to the Nebraska State Penitentiary at Lincoln, Nebraska, the body of Paul E. Rhodes, who was *tried*, *convicted*, and *sentenced* at the April term, 1960, of the District Court of said County, held at Bridgeport, Nebraska, April 18, 1960.

/s/ Maurice Sigler,
Warden of Penitentiary"

showing in writing the complete execution of the sentence. The commitment was made on January 23, 1960, by the terms of these instruments was for the sole purpose of the execution of the sentence and making petitioner serve said void sentence as a convict which in fact was respondent's contention and treatment of petitioner. In fact his oral argument in court was that bond had to be posted to suspend the running of the execution of the sentence. Contrary to his argument in this court at page 9 of his brief, he is attempting to mend his hold, in other words after the Nebraska Supreme Court's decision and after petitioner has been made to serve the sentence once, he changed his position and refused to discharge petitioner, mended his hold at completion of sentence; this was all pointed out to the Nebraska Supreme Court in petitioner's motion for rehearing and brief in support thereof, a copy of which is attached to the record in this case and contained at pages 17 through 26 of said brief.. It will be noted petitioner was committed January 23, 1960, the petition was filed in this action in the District Court

on January 26, 1960, three days thereafter and hearing held thereon, and nowhere did respondent contradict for the record or anywhere else did respondent contend he was not enforcing the commitment and no such contention was raised until the opinion of the Supreme Court of Nebraska raised it in its opinion of June 23, 1961, and petitioner carefully pointed out to said court its mistake on pages 24 and 25 of the brief in support of Motion for Rehearing; pointing out that respondent had furnished petitioner the date of July 5, 1961, when the lawful requirements of the sentence would be completed pursuant to the commitment of November 25, 1960, on which he was committed on January 23, 1961, as Convict No. 21675 to the Nebraska State Penitentiary, p. 24 of said brief:

> "Appropos of this on February 18, 1961, and on June 10, 1961, in *The Forum*, a weekly newspaper published in Lancaster County, Nebraska, Maurice Sigler published notice that Convict Rhodes, Number 21675 (relator in this action) was up for classification hearing along with the other convicts in the same orientation class, and published notice in issue of June 10, 1961, that relator, Convict Rhodes, Number 21675, was up for classification hearing review, which is the work assignment hearing (hard Labor, involuntary servitude) along with the other convicts that were in the same orientation class which notice reads as follows:
>
> 'Classification Hearing . June 13, 1961.
>
> REVIEW
>
> | | |
> |---|---|
> | Jackson, D. | 21671 |
> | Lucky | 21672 |
> | Bell | 21673 |
> | Jackson, A. | 21674 |
> | Rhodes | 21675 |
> | McCartney | 21676 |

Smith	21677
Richards	21678
Montalva	21680
Stayemeizer	21681'

It would seem, therefore, that respondent is in no position at this time to deny the facts that he published the FORUM, because one being held for safe keeping only, is not subject to orientation, does not have a number and is not called before the classification board for hearing on work assignments and respondent, Warden Sigler, is estopped by his actions in claiming or asserting that he did not make relator, Rhodes, Convict Number 21675, serve said sentence pursuant to commitment of November 25, 1960 (R82,83,84,85) and that said sentence has been executed. Therefore, the court's statement to-wit:

'He is not being held as one serving the sentence imposed in that action' is completely erroneous and does not correspond to the facts and actions of the respondent."

which facts and true statement of the actions of respondent were not denied, the record reveals, but the Nebraska Supreme Court for some reason refused to recognize or give weight to the truth when called to their attention as shown by its action in overruling petitioner's motion for rehearing, a copy contained at page 38 of the appendix of petitioner's petition herein.

The record shows the first time Section 29-1001, Revised Statutes of Nebraska, was in any contention plaintiff was held thereunder was the opinion of the Nebraska Supreme Court of June 23, 1961, which invoked a new issue and mend of the hold in the case contrary to the record and facts of the case. obviously done in an attempt to protect respondent from liability for having

falsely imprisoned. Petitioner immediately responded by filing motion for rehearing and brief in support thereof.

The journal entry of November 21, 1960, contained in the petition to the District Court of Lancaster County, Nebraska, to-wit:

> "The defendant was not present and was not represented by counsel—This matter came on further to be heard upon its merits—"

Thereafter on January 16, 1961, at the direction of Sheriff Houston of Morrill County, Nebraska, petitioner was deprived of his liberty without a warrant by sheriff of Cheyenne County, Nebraska, on the claimed authority of the commitment of November 25, 1960, and journal entry of November 21, 1960, copy printed at page 31, appendix A (R.82) of petitioner's petition herein, thereupon applied to District Court of Cheyenne County, Nebraska, for writ of habeas corpus to Honorable John H. Kuns, District Judge, which writ was granted by the court and issued by the clerk, petition almost identical to the petition to Lancaster County District Court, petitioner was produced before the court, hearing held, petitioner remanded to jail, pending further hearing, thereafter on same day on court's own motion, petitioner was found to be unlawfully deprived of his liberty and was by the District Court of Cheyenne County, Nebraska, discharged from custody, and was given his liberty and freed, a copy of said proceedings are printed at Appendix B, pages 25-33, herein of this supplement brief or in alternative original application for a writ of habeas corpus and certified copy thereof filed in this court with this brief, except exhibits which were attached to petition, which would

be same as exhibits attached to Lancaster County Petition and are bulky and cumbersome, except the commitment, return of sheriff, warden's receipt which was not filed in the District Court of Morrill County, Nebraska, until January 24, 1961, eight days later, and petitioner enjoyed seven days of liberty before re-arrest without any order of court or warrant authorizing the same on January 23, 1961, and execution of the commitment, Appendix A, pages 31, 32 and 33 (R.82,83,84) of petitioner's petition herein. The Cheyenne County Habeas Corpus proceeding was not pleaded in the Lancaster County District Court as ground for writ and res judicata of the ground therein for granting issuance of the writ for reason it was not final judgment as the thirty day appeal time had not elapsed on January 26, 1961, the State could appeal, but the State did not appeal and the same is now a final judgment, res judicata.

In a district court petition in Nebraska you do not ordinarily designate all the Constitutional provisions raised in the petition, pleader is only required to plead facts that by the facts raise the Constitutional questions.

ARGUMENT

I.

The District Court of Morrill County Had No Jurisdiction Over the Body of the Petitioner on November 21, 1961 in the Contempt Proceeding and the Supreme Court of Nebraska Acquired No Jurisdiction Over the Body of Petitioner by Reason of Error Proceedings. Supreme Court Acquired No Jurisdiction by Error Proceedings Not Vested in Trial Court, and Trial by

ABSENTIA Gave Trial Court or Supreme Court in Error Proceeding Got No Jurisdiction Over Body of Petitioner.

In Nebraska prosecution for a criminal contempt is not strictly speaking, a criminal proceeding, it is in the nature of a criminal proceeding and is governed by the strict rules applicable to prosecution of a crime. *Gentle v. Pentel Realty Co.*, 120 Neb. 630, 234 N. W. 579.

> "Proceedings to punish party for contempt of court are equivalent to prosecution for a misdemeanor."

In *Harman v. State*, 154 Neb. 626, 74 N. W. 2d 1079, the court said (Syl. 1):

> "A proceeding against a party for contempt is in the nature of a prosecution for a crime and the rules of strict construction applicable in criminal proceedings are governable therein."

In *State ex rel. Wright v. Barlow*, 132 Neb. 166, 271 N. W. 282, it was said:

> "This court has held that a prosecution for criminal contempt is governed by and in accordance with strict rules applicable to criminal prosecutions. In Haydock v. State, 59 Neb. 296, 80 N. W. 902, we said: 'We have repeatedly held that proceedings in contempt are in their nature criminal, and no intendments will be indulged to sustain a conviction for contempt of court.' See Harves v. State, 46 Neb. 149; Wilcox v. State, 46 Neb. 402; O'Chandler v. State, 46 Neb. 10; Zimmerman v. State, 46 Neb. 13. See also, Bee Publishing Co. v. State, 107 Neb. 74, 185 N. W. 339; McCauley v. State, 124 Neb. 102; Maryott v. State, supra, tender the above authorities, we hold that a prosecution for criminal contempt is governed by the strict rules applicable to prosecution by indictment."

The Nebraska Statute defines Felony and Misdemeanor in 29-102, R. R. S. 1943, Reissue 1956:

> "Felony and misdemeanor defined. The term 'felony' signifies such an offense as may be punished with death or imprisonment in the penitentiary. Any other offense is denominated a 'misdemeanor'.

In *Wright* v. *Barlow*, 132 Neb. 166, 271 N. W. 282, the court held:

> "While a prosecution for contempt has many of the attributes of a criminal proceeding, one so charged is not entitled to a jury trial."

In *Smolczyk* v. *Gaston*, 147 Neb. 681, 24 N. W. 2d 862, the court held:

> "Under the holdings of this court, contempt is not a crime although in the nature of a criminal proceeding. Butterfield v. State, 144 Neb. 388, 13 N. W. 2d 572."

It now being established that a contempt prosecution is triable according to the strict rules of criminal procedure, we look at the statutory procedure, 29-2001, R. R. S. Neb. 1943, Reissue 1956:

> "No person indicted for a felony shall be tried unless personally present during trial; persons indicted for misdemeanor may, at their own request, by leave of court be put on trial in their absence. The request shall be in writing and entered on the journal of the court."

and 29-2201, R. R. S. Neb. 1943, Reissue 1956:

> "Before the sentence is pronounced, the defendant must be informed by the Court of the verdict of the jury, and ask whether he has anything to say why judgment should not be passed."

The Nebraska Supreme Court in reference to said statute in a contempt proceeding, *Kope* v. *State*, 124 Neb. 363, 246 N. W. 718, said in Syl. 5:

> "Where the record fails to show affirmatively that the court, before pronouncing sentence, informed defendant that he had been found guilty, and there is no showing in the record to the contrary, it will be presumed such information was given."

The case at bar is not silent, the petition set forth the order of the District Court of Morrill County, Nebraska:

> "The defendant was not present and was not represented by counsel. . . ."

Thereby clearly showing on the face of the record the Nebraska Statutes were not complied with.

Nebraska has no contempt case imposing imprisonment in absence of defendant, but we do have 29-2001, R. R. S. 1943, supra, and from that we must go to other jurisdictions which are few where courts have gone so far from Constitutional guarantees as to impose imprisonment in absence of accused, by trial in absentia, but there are a few and all hold the imprisonment void for want of jurisdiction over the person, in court to commit a person, defendant, to jail or penitentiary in his absence, *trial in absentia*, and so set forth in 17 C. J. S. 86, p. 124:

> "An order of commitment should show that the person found guilty was present in court at the time the punishment for the offense was imposed and a judgment which fails to make such a showing is void."

Such a proposition is sustained by *Liebman* v. *People*, 282 Ill. App. 582 and *People* v. *Stein*, (Ill.) 12 N. E. 2d

824. It was said in *Pelz* v. *Pelz*, 169 N. Y. S. 430, 182 App. Div. 923:

> "Where a person is beyond the jurisdiction of the Court—a motion to punish him for contempt will be denied as futile."

And it further stated at 17 C. J. S. 88, p. 129:

> ". . . an order of commitment in absence of defendant is absolutely void and the order must show the defendant's presence at the time."

The Georgia Court of Appeals held in *Auto Highball Co.* v. *Sibbert*, 11 Ga. App. 618, 75 S. E. 914:

> "The judgment entered for contempt by the judge of the state court was clearly void . . . this being a criminal prosecution, the judge had no power to impose sentence in absence of respondent. The proper course to have followed would have been to have issued an attachment for the person who failed to respond to the rule nise for contempt, have him arrested and brought into court in the manner provided by law. The sentence of the court imposed upon the respondent in his absence was *absolutely void and cannot be enforced against him.*" (Emphasis supplied).

And the West Virginia Supreme Court of Appeals in *Mylius* v. *McDonald*, 61 W. Va. 405, 56 S. E. 602, 10 A. L. R., N. S. 1098, 11 Ann. Cas. 812, held:

> "The record shows no presence of Mylius at the time when order of arrest and imprisonment was made. Its construction is that he was absent. It must show his presence, as stated above, a proceeding for contempt is a criminal proceeding. Judgment of imprisonment cannot be rendered in the absence of the person.—The judgment of imprisonment, having been rendered in the absence of

> Mylius, is *utterly void*, because the authorities just cited show that the judgment of imprisonment must be in the presence of the accused. A Court may impose a fine in his absence. It may try him after legal notice, for a misdemeanor, without his presence; *but never* can it impose imprisonment without his presence. It *must by proper process, get him before the court in BODY*. That process, in case of contempt, is called an 'attachment', which is used in chancery language, only as another word for common law 'Capias'."

This court will note that on page 2 (R.9,10) of petitioner's petition to the District Court of Lancaster County, Nebraska, petition attached to his petition as Exhibit A and made a part thereof the certified copy of the Morrill County District Court Contempt proceedings through January 24, 1961, including the suspension of the judgment of November 21, 1960, on December 23, 1960, by the Nebraska Supreme Court, and the executed commitment of the clerk of the District Court of Morrill County, Nebraska, showing issue date of November 25, 1960 (R.84), showing the sheriff's return showing execution of the sentence and commitment and warden's receipt showing execution of commitment. reprinted at pages 31, 32, 33 (R.83.84,85) of petitioner's petition Appendix A herein, but the certified transcript made a part of the petition contains almost 100 pages (R.9-90) and is part of the record before this court in the record, and shows that nowhere was this petitioner ordered into custody and nowhere was the sheriff issued a warrant or attachment to deprive this petitioner of his liberty. The record clearly shows the *whole, sole*, and only *pretend cause* or *excuse* for deprivation of petitioner's liberty was said commitment which contains this language at page 32, Appendix A (R.84), of

petitioner's petition herein to-wit:

> "You are therefore commanded to proceed to execute said sentence and order of court."

and sheriff's return petitioner's petition herein, Appendix, page 33, to-wit (R.84):

> "Received this commitment on the 25th day of November, 1960 and as commanded by this commitment I on the 23rd day of January, 1961, delivered the within named Paul E. Rhodes to the Nebraska penitentiary at Lincoln, Nebraska.". (R.84)

No clearer language could be used to show the *clear, sole* and *only cause* for *delivery to* the penitentiary was for the SOLE and only purpose of executing the sentence pursuant to the command of the commitment, which was not on file in the District Court of Morrill County, Nebraska, on December 23, 1960, as showing by the signed filing of the clerk made a part of petition in habeas corpus (R.82,83,84) and contained at appendix of petitioner's petition herein at page 32 (R.82, 83, 84, 85) and the warden's receipt contained at appendix of petitioner's petition herein at page 33 (R.82).

> "NEBRASKA STATE PENITENTIARY
>
> Lincoln, Nebraska, Jan. 23, 1961
>
> To the Cierk of the Court:
>
> This Doth certify, That Norval E. Houston, sheriff of Morrill County, Nebraska, did, on the day of the date hereof, deliver to Nebraska State Penitentiary at Lincoln, Nebraska, the body of Paul E. Rhodes who ws tried, convicted, and sentenced at the April Term, 1960, of the District Court of said county held at Bridgeport, Nebraska, April 18, 1960.
>
> /s/ Maurice Sigler,
> Warden of Penitentiary"

No clearer language of execution of sentence could be stated by respondent. The commitment was not held but was returned as executed and filed to the Clerk of the District Court of Morrill County as executed (R. 82,83,84,85) and warden's receipt for execution of the commitment was issued pursuant to Section 29-2401, R. R. S. Neb. 1943, set out in full at pages 9 and 10 of petitioner's petition in this court. The commitment was not before the Supreme Court of Nebraska in the error proceeding and could not have been before the Nebraska Supreme Court for the reason said error proceedings were filed in said court on December 19, 1960 (R.81) and said commitment to penitentiary (R.82-84) was not filed until January 24, 1961, in the District Court of Morrill County, Nebraska, thirty-six days after the filing of the error proceeding and therefore was not before the Nebraska Supreme Court for determination in the error proceeding but was clearly pleaded in case at bar by making the same a part of the petition in the case at bar and respondent should not after he has made petitioner serve said void sentence pursuant to the commitment be permitted to *mend his hold* and deny or evade the truth that he has made petitioner serve the sentence of infamous punishment and continues in violation of the XIII and XIV amendments of the United States Constitution to impose infamous punishment on petitioner and deprive petitioner of his liberty.

The Texas Court held in *Love* v. *State*, (1913) 71 Tex. Crime 259, 158 S. W. 532:

> "The Court has no power or authority to try one accused of a misdemeanor, in his absence, over his attorney's protest and objection for him, if he was

> sick, and absent on that account, his case should not have been forced to trial. If the Court was satisfied that he was feigning sickness, or was not in fact sick, so as to prevent his appearance, he should have forfeited his bond, issued another writ for his arrest, and had the accused brought into court and then proceeded with the trial."

Wheeler & Mfg. Co. v. *Boyce*, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571:

> "The question of the validity of a sentence for criminal contempt, rendered in the absence of contemnor does not seem to have been raised, except in two cases. The lack of authority is due, doubtless, to the fact, that, as has been pointed out, the courts are unanimous in looking upon such proceeding as *stricti juris;* hence the accused is entitled to the same safeguards as a criminal prosecution. Therefore a final judgment rendered in the absence of the accused one accused of a criminal contempt—is void."

Accordingly, it was held in *Welch* v. *Barber*, 52 Conn. 147, 52 Am. Rep. 567:

> "That where the act alleged to be a criminal contempt was equivocal and might or might not be contempt, and it was necessary to examine witnesses to determine that the question, the party accused *must be present*, and must be given opportunity to be heard in his own defense. The court therefore set aside the conviction, though made in the presence of the accused authorized attorney, and though *there was no question as to notice having been given accused.*"

The petition and attached exhibits, made a part thereof, clearly plead that petitioner was not in custody or jurisdiction of the court on November 21, 1960 (R.6-

90) and no order was ever entered by any court authorizing the issuance of a warrant to deprive petitioner of his liberty, and no warrant was ever issued authorizing the sheriff to deprive the petitioner of his liberty (R.82-85) and no warrant was ever issued authorizing the sheriff to deprive the petitioner of his liberty as required by the Fourth Amendment to the Constitution of the United States of America and attached to and made a part of the petition (R.83) is the commitment to the penitentiary issued by the clerk of the district court without an order of court authorizing the issuance of the same. The petition (R.82) of the record is the warden's certificate pursuant to 29-2801, R. R. S. Neb. 1943, showing execution of the sentence on January 23, 1961, committing this petitioner as convict to the Nebraska penitentiary to serve said void sentence.

The petition further directly raises Article I, Section 9, of the United States Constitution (R.12).

Therefore, argument 1, page 5, of respondent's brief herein is an erroneous statement of the law and facts.

The Nebraska Supreme Court held in *In re Crane's Estate*, 166 Neb. 268, 89 N. W. 2d 44 at page 45 (Syllabus 1), 1958:

> "Courts are bound to take notice of the limits of their authority, and accordingly a court may of its own motion, even though the question is not raised by the pleadings or is not suggested by counsel, recognize the want of jurisdiction, and it is its duty to act accordingly by staying the proceedings, dismissing the action, or otherwise noticing the defect, at any stage of the proceeding."

Thus when the Nebraska Supreme Court attempted to and did defeat petitioner's petition relying on the

void judgment of November 21, 1960, which gave no court any jurisdiction over the body of the petitioner and it was breaching its duty and constitutional authority pursuant to its own statement of the law, last above quoted and was violating this petitioner's Federal Civil Rights and the Bill of Rights of the United States Constitution and particularly the 14th Amendment. Thus the Supreme Court of Nebraska had acquired no jurisdiction over the body of petitioner, in error proceeding, as stated by respondent at page 5 of his brief is false and erroneous, as is the statements of the Nebraska Supreme Court in *Rhodes* v. *Sigler*, 172 Neb. 439, printed in Appendix A, pages 24 and 25, of petitioner's petition herein.

In a district court petition in Nebraska pleader does not designate in the petition the Constitutional provisions and Federal questions raised by petition, but is only required to plead facts that raise the Constitutional questions and provisions, and the provisions are not ordinarily designated by number.

That the allegation of a trial in absentia, on which infamous punishment is imposed automatically raises the Federal question of due process and equal protection of the law under the 5th and 14th Amendments of the United States Constitution.

II.

The Only and Sole Authority Ever Claimed by Respondent For Depriving Petitioner of His Liberty Is the Commitment of November 25, 1960 and Trial in Absentia Judgment of November 21, 1960 For the

Sole Purpose Making Petitioner Serve Said Void Sentence.

Respondent and his attorneys, Clarence A. H. Meyer and Cecil S. Brubaker know they made petitioner serve said void sentence as Convict 21675 as argued by petitioner and do not deny same on page 9 of their brief herein but merely attempt to avoid same by stating at page 9:

> "Petitioner attempts to inject argument as to how he was thereafter treated, to show that he was serving sentence, but none of these matters, whether true or not, appear in the record."

Respondent and his attorneys know they are true. That the only paper respondent had for depriving petitioner of his liberty was the commitment of November 25, 1960 (R.83), which was returned to the Clerk of the District Court of Morrill County on January 24, 1961, after the error proceedings were filed and showing its execution pursuant to its command (R.84) on January 23, 1961, thirty-four days after the purported judgment on which its purported commitment is based was suspended (R.82) and the sheriff if he had delivered petitioner to respondent for any purpose other than serving sentence would have retained the paper of his authority and not returned the same to the clerk of district court as executed (R.84) to-wit:

> "Received this commitment on the 25th day of November, 1960 and as commanded by this commitment I on the 23rd day of January, 1961, delivered the within named Paul E. Rhodes to Nebraska penitentiary at Lincoln, Nebraska."

and the warden would not have issued receipt to clerk of the district court pursuant to 29-2401, R. R. S. Neb. 1943, to-wit (R.82):

> "This Doth certify, that Norval E. Houston, sheriff of Morrill County, Nebraska did on the day of the date hereof, deliver to Nebraska State Penitentiary at Lincoln, Nebraska, the body of Paul E. Rhodes who was tried, convicted and sentenced at the April term, 1960 of the District Court of said county, held at Bridgeport, Nebraska, April 18, 1960.

We must note the language above quoted:

> "who was tried, convicted and sentenced at the April, 1960 term of the District Court of said county, . . ."

can have no other meaning than execution of the void sentence to involuntary servitude, infamous punishment contrary to the 13th Amendment and repugnant thereto without due process of law and equal protection of the law in violation of 14th Amendment of the United States Constitution, Section 1. The petitioner not having been charged with, tried for or convicted of a crime in connection with his commitment to the Nebraska State Penitentiary and the denial of the issuance of the writ of habeas corpus by the District Court of Lancaster County and the Supreme Court of Nebraska denying said writ was a suspension of the writ and the actions of said courts were repugnant to Article I, Section 9 of the United States Constitution and applicable to the States by reason of the 14th Amendment of the U. S. Constitution, *Monroe* v. *Pape*, (1961) 365 U. S. 167, 81 S. Ct. 473.

The part of the Nebraska Supreme Court's opinion printed at pages 9 and 10 of the respondent's brief (*Rhodes* v. *Sigler*, supra) fails to recognize that the United States Constitution requires a written document

of authority to deprive petitioner of his liberty and restrain and commit him to infamous punishment in the Nebraska State Penitentiary and the only documents ever issued were set forth in full in petitioner's petition to the District Court of Lancaster County, Nebraska, and are before this court in the record (R.82,83,84,85), and when these documents fail to meet the Constitutional test of authority under Amendments IV, V, VI, VIII, XIII, and XIV, of the United States Constitution, the sheriff and penitentiary warden are vested with no other authority to deprive and restrain petitioner of his liberty and commit him to involuntary servitude having *no other warrant, writ or other process* authorizing them to restrain petitioner of his liberty and having no authority vested by law in them to keep petitioner committed to the penitentiary restrained of his liberty.

The Supreme Court of Nebraska in its opinion quoted on pages 9 and 10 of respondent's brief (*Rhodes* v. *Sigler*, supra) to-wit:

> "We think it clear from the 21st day of November 1960, when the contempt judgment was rendered, the relator was subject to be taken into custody and held pending further orders of this court."

ignores the facts apparent on the face of the judgment that the same is void on its face, repugnant to the IV, V, VIII, XIII, and XIV Amendments of the United States Constitution and when said void judgment was on January 23, 1961, used as pretended authority to deprive petitioner of his liberty and commit him to infamous punishment, involuntary servitude, the United States Constitution had been violated, petitioner was unlawfully and falsely imprisoned without lawful au-

thority, the state had executed the VOID SENTENCE, without lawful authority and in contempt of the Nebraska Supreme Court order suspending the execution of the judgment of November 21, 1960 (R.81), and almost every conceivable United States Constitutional guarantee has been denied this petitioner.

The Supreme Court of Nebraska entered no order authorizing respondent and Morrill County Sheriff to deprive petitioner of his liberty or ordered him into the custody of the sheriff which it had no jurisdiction to do.

The petitioner further shows the court that on July 29, 1962, petitioner will have completely served said void judgment of involuntary servitude by trial in absentia twice, under two convict numbers, No. 21675 and No. 22107, and this court can take judicial notice that convict numbers are only assigned to those serving sentence on a commitment to the penitentiary.

The Nebraska Supreme Court in *Lingo* v. *Hann*, 71 N. W. 2d 716 at page 719, set forth the requirement for the writ of habeas corpus as follows, to-wit:

> "Habeas corpus a collateral and not a direct proceeding when regarded as a means of attack upon a judgment sentencing defendant."
>
> "Habeas corpus is a writ of right, but not a writ of course, and probable cause must be shown for its allowance."
>
> "In a petition for a writ of habeas corpus, if relator sets forth facts which, if true, would entitle him to discharge, then the writ is a matter of right and the relator should be produced and a hearing held thereon to determine the questions of fact presented, but if relator shows by the facts alleged in his petition for the writ that he is not entitled to relief, the writ should be denied."

". . . if a court or a judge thereof renders a judgment, or who enters an order, has not jurisdiction to perform the act done, either because the proceeding or the law under which it is taken is unconstitutional, or for any other reason the judgment is void, it may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged."

"Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had *jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose.*"

"To release a person from a sentence of imprisonment by habeas corpus it must appear that the sentence was absolutely void." (Emphasis supplied)

SUMMARY

Petitioner's petition meets all of these requirements as heretofore pointed out in this brief, (1) trial in absentia is *void* and *gave the court no jurisdiction over the* person of defendant, (2) the court had no power, authority or jurisdiction in contempt proceeding to impose sentence to penitentiary at hard labor, infamous punishment as pointed out at pages 15 and 16 of petitioner's petition to this court in the case at bar, (3) the judgment of November 21, 1960, under pretended authority of which the respondent and Nebraska Supreme Court pretend to commit petitioner are absolutely void as repugnant to the V, VI, VIII, XIII, and XIV Amendments of the United States Constitution and the court was without power, authority or jurisdiction to enter such judgment and on June 23, 1961, when the Nebraska Supreme Court attempted to and did inject

Section 29-1001, R. R. S. Neb. 1943, into the issue in the case in its opinion of *Rhodes* v. *Sigler*, supra, it was repugnant to the United States Constitution, Amendment XIV, because it would be a denial of the law guaranteed by said amendment to impose infamous punishment and involuntary servitude (commitment to the penitentiary at hard labor) before final judgment, that it would have no power, authority or jurisdiction to impose after final judgment.

Further the Nebraska Supreme Court on May 26, 1961, had no jurisdiction to invade the legislative field in *McFarland* v. *State*, 172 Neb. 251 at page 256 repeal 29-2801, R. R. S. Neb. 1943, and repeal by the court's opinion said section of the statute 29-2801, R. R. S. Neb. 1943, and deprive county courts and district courts of jurisdiction where petitioner was deprived of his liberty unlawfully, and said opinion is repugnant to Article II, Section 1 of the Nebraska Constitution, quoted at page 7 of petitioner's petition herein and is thereby a denial of due process and equal protection of the law clause of the 14th Amendment of the United States Constitution, and invasion of the legislative field by the Nebraska Supreme Court.

That the allegation of trial in absentia in petition in district court when infamous punishment was imposed automatically raises Federal question of due process of law and equal protection of law pursuant to 5th and 14th Amendments of United States Constitution.

Note Second Commitment being made to serve second time same void sentence, without being granted discharge on first commitment and warden's receipt, Appendix C, in this brief on pages 34-36.

CONCLUSION

For the foregoing facts and reasons, this petition for writ of certiorari to the Nebraska Supreme Court should be granted, or in the alternative, and in the interest of justice considering how slowly the wheels of justice turn, the court consider the petition as an original application for writ of habeas corpus and grant writ of habeas corpus to petitioner herein, and against respondent, and if the matter is set for later hearing, that the court fix bail for petitioner during pendency of the proceeding, and enter all orders the interest of justice require, and order prisoner discharged from custody and restored to his liberty.

Respectfully submitted,

PAUL E. RHODES, *pro se*,
Convict No. 22107, Nebraska
State Penitentiary without
being charged, tried for,
or convicted of a crime.

APPENDIX B

(Filed Jan. 16, 1961)

IN THE DISTRICT COURT OF CHEYENNE COUNTY, NEBRASKA

PETITION

PAUL E. RHODES, RELATOR AND PLAINTIFF
vs.
W. W. SCHULZ and KERMIT BRUMBAUGH,
RESPONDENTS AND DEFENDANTS

Comes now your petitioner, Paul E. Rhodes, and respectfully shows to the Honorable John H. Kuns, judge of the District Court of Cheyenne County, Nebraska, that he is unlawfully imprisoned and restrained of his liberty by W. W. Schulz, sheriff and jailor thereof, and Kermit Brumbaugh, deputy sheriff, both of Cheyenne County, Nebraska.

That the imprisonment and restraint are illegal and that the illegality thereof is under and by virtue of a pretended judgment and sentence; and a commitment based thereon which your petition has not seen and does not have a copy thereof, said pretended judgment and sentence is in substance as follows:

"IN THE DISTRICT COURT FOR MORRILL COUNTY, NEBRASKA

(CASE NO. 4819 Page 604 & Page 605)

THE STATE OF NEBRASKA, PLAINTIFF,
vs.
PAUL E RHODES, DEFENDANT

JOURNAL ENTRY

(Filed November 25, 1960)

Now on this 21st day of November, 1960, one of the regular days of the September 1960 term of court, this matter came on further to be heard upon the

motion of the defendant for a continuance on the ground of his claim of physical illness and inability to attend trial. The State was represented by County Attorney, James L. Macken. The defendant was not present and was not represented by counsel although duly notified of this hearing. Evidence was adduced by the State tending to show considerable physical activity on the part of the defendant, wholly inconsistent with defendant's claim of physical inability to attend trial. The court being fully advised in the premises finds that defendant's motion for continuance filed this date should be, and is hereby overruled.

This matter came on further to be heard upon the motion of defendant for dismissal of the information, and said motion is hereby overruled.

This matter came on further to be heard upon the merits. The State introduced additional evidence pursuant to the order of the court heretofore entered permitting the State to withdraw its rest, and the matter was submitted to the court, and the court being fully advised in the premises finds the defendant guilty of contempt as charged and that he should be sentenced to confinement in the Nebraska State Penitentiary for a period of nine (9) months at hard labor, Sunday and holidays excepted, and to pay a fine of two thousand five hundred dollars ($2,500.00) and the costs of this proceeding.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the defendant, Paul E. Rhodes, is guilty of contempt of court as charged and is hereby sentenced to confinement in the Nebraska State Penitentiary at Lincoln, Nebraska, for a period of nine (9) months at hard labor, Sundays and holidays excepted, and to pay a fine in the amount of two thousand five hundred dollars ($2,500.00) and the costs of this proceeding.

BY THE COURT:
s R. M. Van Steenberg
District Judge"

Your petitioner alleges that the judgment and sentence so pronounced by the said purported District Judge, R. M. Van Steenberg was and is null and void, and of no force and effect, for the reason the District Judge or purported district judge had no jurisdiction to try said action in the absence of the defendant, relator in this action, and had no jurisdiction or authority to enter judgment and to pass sentence in the absence of the defendant, relator in this action, that a copy of the complaint and proceedings from August 1, 1960 to September 10th, 1960 are hereto attached Marked "Exhibit A" and made a part hereof as fully as though herein set out at length, and that the court had no jurisdiction, power or authority, to pronounce judgment and sentence of fine and imprisonment in the Nebraska State Penitentiary at hard labor for nine months and fine of $2,500.00 for the offense of contempt of court charged in the complaint, contempt of court not being a crime, and was without authority jurisdiction, power or authority to pronounce a sentence at hard labor and that the same violates Article 1, Section 2 of the Constitution of the State of Nebraska, and the Thirteenth Amendment to the Constitution of the United States of America, and constitutes involuntary servitude and slavery prohibited by said constitutions.

That this relator was discharged from said unlawful imprisonment in said aforesaid case being case number 4819 in the District Court of Morrill County, Nebraska, by a Writ of Habeas Corpus and Discharge duly entered by the County Court of Morrill County, Nebraska, on September 2, 1960, which judgment and discharge was not appealed and is now a final judgment of record, a duly certified and authenticated copy of said order of discharge is hereto attached marked Exhibit B and herein made a part of this petition the same as if copied in full herein, and that said discharge deprived the District Court of Morrill County, Nebraska, and R. M. Van Steenberg of all jurisdiction over the relator in this action and defendant in case No. 4819 in the District Court of Morrill County, Nebraska, and that said court had no

jurisdiction, power or authority, to try this relator, to pronounce judgment and sentence of fine and imprisonment thereafter on the charge of contempt, and had no jurisdiction, power or authority in case No. 4819 in the District Court of Morrill County, Nebraska being State of Nebraska vs. Paul E. Rhodes, on November 21, 1960.

That case No. 4819 referred to in the District Court of Morrill County, Nebraska is derivative of Cases No. 4772 being State of Nebraska -vs- Paul E. Rhodes and Case No. 4788 in the District Court of Morrill County, Nebraska, Paul E. Rhodes, -vs- Norval E. Houston et. al., and that R. M. Van Steenberg District Judge of the 17th judicial district disqualified himself because of bias and prejudice in both case No. 4772 and case No. 4788, and was therefore disqualified and without jurisdiction because of self declared disqualification in the last aforesaid mentioned cases in case No. 4819 and so interwoven and interdependent that the disqualification in the other cases could not be disregarded and was an attempt to usurp the jurisdiction of the Honorable Edmund Nuss of his rightful jurisdiction in case No. 4788 and to deprive the District Court of Morrill County, Nebraska of the Body of Paul E. Rhodes in case No. 4788 in which he is custodia legis and gramia legis and the same being a habeas corpus proceeding and therefore any pretended judgment entered by R. M. Van Steenberg in case No. 4819 was entered without jurisdiction, power or authority to try said cause, enter judgment on November 21, 1960 and pronounce sentence on November 21, 1960 in case No. 4819.

That the purported action of R. M. Van Steenberg on November 21, 1960 heretofore referred to was an attempt to suspend the Writ of Habeas Corpus contrary to Article 1, Section 8 of the Constitution of the State of Nebraska, and Article 1, Section 9 of the constitution of the United States of America, and unconstitutional and contrary to said constitutions and to deprive the relator of this action of his civil rights guaranteed by both aforesaid mentioned constitutions.

That this relator was discharged from said unlawful imprisonment in said aforesaid case being case number 4819 in the District Court of Morrill County, Nebraska, by a Writ of Habeas Corpus and Discharge duly entered as above alleged.

That this relator was denied due process of law in case No. 4819 in the district court of Morrill County, Nebraska as above set out and was not given a trial by jury all contrary to article 1, Section 3 of the Constitution of State of Nebraska and the 14th Amendment to the Constitution of United States of America.

Wherefore, your petitioner prays, that a writ of habeas corpus be granted; and directed to W. W. Schulz, sheriff and jailor thereof, of the County of Cheyenne and State of Nebraska, and Kermit Brumbaugh, his deputy sheriff, of county and state aforesaid, commanding them to have the body of your petitioner before the District Court of Cheyenne County, Nebraska at a time and place therein to be specified to do and obey what shall then and there be ordered by said court concerning petitioner, together with the time and place and cause of this detention, and said writ, and that your petitioner may be discharged and restored to his liberty.

/s/ Paul E. Rhodes

State of Nebraska)
) ss.
County of Cheyenne)

Paul E. Rhodes, being first duly sworn upon oath, deposes and says that he is the plaintiff, relator, in the above entitled action and that he has read the foregoing petition and that he knows the facts therein contained and that the facts therein contained are true as he verily believes.

/s/ Paul E. Rhodes

Subscribed and sworn to before me this 16th dav of January, 1961.

/s/ Ruby Spindler Henkle
Clerk of District Court
Cheyenne County

My commission expires

(Filed District Court Cheyenne County, Jan. 16, 1961)

IN THE DISTRICT COURT OF CHEYENNE, COUNTY, NEBRASKA

Paul E. Rhodes, Relator and Plaintiff

-vs-

W. W. Shulz and Kermit Brumbaugh, Respondents and Defendants

WRIT OF HABEAS CORPUS

State of Nebraska)
) ss.
County of Cheyenne)

To W. W. Schulz and Kermit Brumbaugh deputy sheriff:

You are hereby commanded to have the body of Paul E. Rhodes, by you unlawfully deprived of his liberty as is alleged, and together with the cause of his detention before John H. Kuns, judge of the district court, at the courthouse in Sidney, Nebraska, forthwith and then and there to be delt with according to law, and have you then and there this writ.

Witness Ruby Spindler Henkle, Clerk of the district court, Cheyenne County and the said seal of said court fixed hereto this 16th day of January, 1961.

/s/ Ruby Spindler Henkle
Clerk of the District Court

(Filed District Court Cheyenne County, Jan. 16, 1961)

IN THE DISTRICT COURT OF CHEYENNE COUNTY, NEBRASKA

Paul E. Rhodes, Relator and Plaintiff

-vs-

W. W. Schulz and Kermit Brumbaugh, Respondents and Defendants

RETURN TO WRIT OF HABEAS CORPUS

Comes now W. W. Schulz, respondent, and the person upon whom the writ of habeas corpus was served in this case, and for his return and answer to the same alleges:

1. Admits that he has the said Paul E. Rhodes in his custody, power and under restraint.

2. That the authority and true and whole cause of such imprisonment is by reason of the direction of the County Attorney of Morrill County, Nebraska, James L. Macken and the Sheriff of Morrill County, Nebraska, Norval Houston, pursuant to an order Judgment and Journal Entry of the District Court of Morrill County, Nebraska of November 21, 1960, a copy of which is hereto attached and herein made a part of this return the same as if copied in full herein. That a copy of said warrant of commitment is hereto attached and herein made a part of this return the same as if copied in full herein. In obedience to the writ of habeas corpus issued herein he now produces the body of said Paul E. Rhodes before John H. Kuns, District Judge of Cheyenne County, Nebraska and the District Court of Cheyenne County, Nebraska, to be dealt with according to law.

/s/ W. W. Schulz
Sheriff of Cheyenne County, Nebraska

Appendix

(Filed District Court Cheyenne County, Jan. 16, 1961)

IN THE DISTRICT COURT OF CHEYENNE, COUNTY, NEBRASKA

Paul E. Rhodes, Relator and Plaintiff

-vs-

W. W. Schulz and Kermit Brumbaugh, Respondents and Defendants

ORDER IN HABEAS CORPUS

On reading the petition of Paul E. Rhodes duly verified whereby it appears that he is illegally imprisoned and restrained of his liberty by W. W. Schulz, Sheriff of Cheyenne County, Nebraska, and stating wherein the illegality consists from which it appears that he is entitled to a writ of habeas corpus and that the same shall issue; produced to me a copy of the order of conviction and commitment and cause of his detention by which said Paul E. Rhodes is deprived of his liberty, and it appearing to me that the said Paul E. Rhodes is unlawfully detained, it is therefore ordered that a writ of habeas corpus be allowed to issue in favor of Paul E. Rhodes, returnable forthwith and directed to W. W. Schulz, sheriff, and Kermit Brumbaugh deputy sheriff.

BY THE COURT

/s/ John H. Kuns
District Judge

In the District Court of Cheyenne County, Nebraska

(FILED District Court of Cheyenne County Jan. 20, 1961.)

No. 6617

PAUL E. RHODES, RELATOR AND PLAINTIFF,

VS.

W. W. SCHUTZ and KERMIT BRUMBAUGH,
RESPONDENTS AND DEFENDANTS.

JOURNAL ENTRY

ON THIS 16th day of January, 1961, on reading the petition of Paul E. Rhodes alleging that he is illegally imprisoned and restrained of his liberty by respondents, the sheriff and deputy sheriff, respectively, of Cheyenne County, Nebraska, it is ordered that a writ of habeas corpus issue out of and under the seal of the District Court of Cheyenne County, Nebraska directed to respondents, commanding them to have the body of Paul E. Rhodes before the court forthwith, to do and receive what shall then and there be considered concerning him, together with the time and cause of his detention, and that he have then and there such writ of habeas corpus together with his return or pleading thereto.

Thereafter on the same day, the respondents having produced the body of Paul E. Rhodes before the court and made return to the writ of habeas corpus, it is ordered that respondents be allowed 10 days to file further pleadings, and that bail for the release of relator be fixed at the sum of $1,000.00.

And thereafter, on the same day, the court having carefully examined the petition and the return to the writ of habeas corpus, and it appearing to the court that the order of the District Court of Morrill County, Nebraska set out in the petition and referred to in the return is not a warrant or commitment, on the court's own motion it is ordered that the relator be discharged on the sole ground that his arrest by respondents was not by virtue of any warrant or order of commitment.

It is further ordered that the court's earlier order fixing bail be and it is hereby vacated.

BY THE COURT:

/s/ John H. Kuns
Judge

APPENDIX C

(Filed November 3, 1961, /s/ Virginia A. Schuetz, Clerk District Court)

IN THE DISTRICT COURT OF MORRILL COUNTY, NEBRASKA

No. 4819

THE STATE OF NEBRASKA, Plaintiff

v.

PAUL E. RHODES, Defendant.

COMMITMENT

STATE OF NEBRASKA)
) SS.
MORRILL COUNTY)

THE STATE OF NEBRASKA, MORRILL COUNTY, TO THE SHERIFF OF SAID COUNTY:

WHEREAS, at a regular term of the District Court of Morrill County, Nebraska, commenced on April 18, 1960, Clarence S. Beck, Attorney General of Nebraska came in to court on July 29, 1960 and presented a certain information in due form of law against Paul E. Rhodes, charging said Paul E. Rhodes with contempt of the District Court of Morrill County, Nebraska, which information was duly filed and the cause docketed, and

WHEREAS afterwards on August 1, 1960, September 6th and 7th, 1960 and November 21, 1960, further proceedings were had upon said information, to-wit: the defendant Paul E. Rhodes was brought before the court, notified of the accusation against him and allowed time to make his defense, trial was had to the court upon the information, the answer of defendant Paul E. Rhodes, and the evidence, and the court upon consideration thereof found the defendant guilty of contempt of court as charged in the information, and

WHEREAS, on November 21, 1960, the court entered judgment and sentenced the said Paul E. Rhodes in these words:

> "IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the defendant, Paul E. Rhodes, is guilty of contempt of court as charged and is hereby sentenced to confinement in the Nebraska State Penitentiary at Lincoln Nebraska, for a period of nine (9) months at hard labor, Sundays and holidays excepted, and to pay a fine in the amount of two thousand five hundred dollars ($2,500.00) and the costs of this proceeding."

AND, WHEREAS, on December 23, 1960, the said Paul E. Rhodes having filed a petition in error in the Supreme Court of Nebraska, the Supreme Court suspended execution of said judgment as prayed by the defendant Paul E. Rhodes, and issued a writ of error to the District Court of Morrill County, Nebraska, which was filed in the District Court of Morrill County, Nebraska on December 27, 1960, which writ of error duly notified the District Court of Morrill County, Nebraska, that execution of such judgment and sentence had been suspended, and

WHEREAS, thereafter during the September term, 1961, of the Supreme Court of Nebraska it was considered and adjudged by the Supreme Court that such error proceedings be dismissed for failure to file briefs under the provision of Rule 15 of the Supreme Court, and judgment of dismissal was accordingly rendered, and

WHEREAS, thereafter on October 17, 1961 the Supreme Court of Nebraska duly issued its mandate to the District Court of Morrill County, Nebraska reciting the entry of such judgment dismissing said error proceedings and remanding the cause to the District Court, which mandate was received and filed in the District Court of Morrill County, Nebraska on October 18, 1961.

You are therefore commanded to proceed to execute said sentence, judgment and order of the court.

WITNESS my hand and the seal of said court at Bridgeport, Nebraska this 30th day of October, 1961.

's/ Virginia A. Schuetz
Clerk of the District Court

State of Nebraska)
) ss.
County of Morrill)

Received this Commitment on the 30th day of October, 1961 and as commanded by this Commitment, I on the 2nd day of November, 1961 delivered the within named Paul E. Rhodes to the Nebraska State Penitentiary at Lincoln, Nebraska.

Dated this 3rd day of November, 1961.

's/ Norval E. Houston, Sheriff

Fees:

Mileage Train Fare	$ 26.68
Meals & Room	12.45
Filed for with County	$ 39.13

NEBRASKA STATE PENITENTIARY

Lincoln, Nebraska, Nov. 2, 1961

To the Clerk of Court:

This Doth Certify, That Norval E. Houston, Sheriff of Morrill County, Nebraska, did, on the day of the date hereof, deliver to the Nebraska State Penitentiary, at Lincoln, Nebraska, the body of Paul E. Rhodes who was tried, convicted, and sentenced at the December Term, 1960, of the District Court of said County, held at Bridgeport, Nebraska, November 21, 1960.

(Signed) Maurice H. Sigler
Warden of Penitentiary